Filed 3/5/20 P. v. Gomez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD JOSEPH GOMEZ II, Defendant and Appellant.	F075678 (Kern Super. Ct. No. BF138013A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman and Charles R. Brehmer, Judges.†

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

† Judge Friedman presided over the guilt phase, first sanity trial and sentencing hearing. Judge Brehmer presided over the second sanity trial.

INTRODUCTION

On August 9, 2011, appellant/defendant Richard Joseph Gomez II stabbed and killed Lorenzo Hernandez while they were on a city bus in Bakersfield. There was no evidence that defendant knew the victim before he killed him. Defendant pleaded not guilty and not guilty by reason of insanity.

After the guilt phase, the jury convicted defendant of first degree premeditated murder.

The first sanity trial was held before the same jury, but it was unable to reach a verdict on whether defendant was sane at the time of the murder. The parties stipulated that the second sanity trial would be held before the court acting as the trier of fact. Thereafter, the court heard additional evidence and reviewed the transcripts of the prior proceedings, and found defendant was sane at the time of the murder.

Defendant was sentenced to 25 years to life plus one year for a deadly weapon enhancement.

In the first part of this opinion, we will review the facts from the guilt phase, and then address the three issues that defendant raises to challenge his murder conviction – that his postarrest interview should have been excluded because he allegedly tried to invoke his right to remain silent during the interview; and the jury was erroneously instructed on the limited admissibility of voluntary intoxication.

In the second part of this opinion, we will review the evidence introduced at the first and second sanity trials, which the court considered before finding defendant was sane at the time of the murder. We will then address defendant's challenges to the court's sanity finding – that defense counsel was prejudicially ineffective for failing to object to certain evidence at the second sanity trial; the court improperly presumed defendant was sane and shifted the burden of proof to him; and the court misstated the burden of proof.

In the third part, we will review the court's sentencing findings and address defendant's contention that the matter must be remanded for the court to consider whether defendant should receive diversion based on a statute enacted after he was tried, convicted, and sentenced for murder, and which specifically excludes persons charged with murder.

We affirm defendant's conviction for first degree murder and the court's finding that he was sane at the time of the murder and decline to remand the matter.

PART I

EVIDENCE INTRODUCTED AT GUILT PHASE

Defendant was a friend of Maria Jimenez (Maria) and her family.[1] Defendant and Maria were in a dating relationship in 2011. Defendant was older than Jimenez. Maria was 19 years old but appeared to be much younger. Maria testified defendant was an alcoholic, he always drank beer, "[t]hat's the only thing he did," and he had used methamphetamine in the past.

On the morning of August 9, 2011, defendant was at the house where Maria lived with her mother and family, on Meadows Street in Bakersfield. He had stayed there overnight. Gloria Jimenez (Gloria), Maria's mother, thought defendant was acting strange, weird, and suspicious that morning. Gloria had never seen him act that way before.

Defendant told Maria that they needed to go the police department together, so he could "clear his name" because "everybody thought [Maria] was underage." Defendant said he was going to get in trouble if they did not clear his name. Maria asked defendant, "[W]ho's telling you all this? I think his friends or other people, whatever, told him that." Maria agreed to go with defendant to the police and "tell them my real age."

---

[1] There are multiple people in this case with the last name of Jimenez and not all of them are related. We will use first names for ease of reference.

The bus stop

Maria and defendant left her house together. Defendant had a knife. They walked to a bus stop at the corner of Pioneer and Fairfax. Defendant borrowed money from Maria and bought a 24-ounce can of King Cobra beer at a market near the bus stop.

Maria and defendant waited at the bus stop, and defendant drank the beer. A heavyset man in his thirties, later identified as Lorenzo Hernandez, was also waiting for the bus and carrying a bag. Hernandez worked as a volunteer at the Kern County Mental Health Consumer Family Learning Center. He had no ties to any criminal street gangs. There was no evidence defendant and the victim knew each other.

Maria testified defendant and Hernandez started to talk, and then defendant argued with Hernandez. Maria tried to find out what was going on. Defendant told her to stay away because he needed to talk to the man, so she stepped back.

Maria believed defendant and Hernandez were arguing because Hernandez thought she was "a little girl" and under the age of 18 years. Hernandez asked defendant, "[W]hy [are] you with a young person?" and he did not think that was right. Defendant replied, "[N]o, she's overage."

Defendant kills Hernandez

The bus arrived at the stop and defendant, Maria, and Hernandez got in. There was a surveillance camera in the bus that showed the next events. Hernandez sat in the first seat next to the bus's front door. Defendant and Maria sat in the back of the bus. The driver testified defendant and Hernandez were not arguing when they got on the bus or while it was moving.

The bus driver arrived at the next stop within three minutes. The bus driver had to stay at that stop for a few extra minutes, so he would not run ahead of the route's schedule. Defendant approached the bus driver and asked, "What time are we leaving?" The bus driver testified defendant acted normal when he asked the question. The driver explained the delay and defendant turned around. The driver then turned his attention to

a woman at the bus stop who was in a wheelchair and needed help to get on with the platform lift.

The bus driver suddenly heard screaming from inside the bus. The driver turned around and saw defendant on top of Hernandez, who was still sitting in the front passenger seat. He thought defendant was punching Hernandez.

Maria testified defendant walked to the front of the bus, asked the driver if he could get off, and then she heard someone scream. Maria looked up and saw Hernandez shaking. Maria thought defendant punched Hernandez and did not see any blood. Defendant walked back to Maria's seat, and Maria asked what was going on. Defendant told her, "Just leave."

Maria got off the bus with defendant, and they walked away in different directions.

The fatal wounds

At 10:01 a.m., Deputy Jeff Colbert of the Kern County Sheriff's Department responded to a dispatch about a possible stabbing on the bus. He found Hernandez lying on the seat. Hernandez was not moving, and he did not have a pulse. Colbert started resuscitation efforts, but Hernandez died from stab wounds.

The pathologist testified Hernandez suffered two stab wounds into the front of his upper left chest. Both stab wounds penetrated 10 inches into Hernandez's chest and penetrated his heart. One wound was horizontally-oriented and close to the midline. The other wound was vertically-oriented and close to the left side. The knife went through the muscles between two ribs, nicked the left lung, went into the heart, and continued into the pulmonary artery, the pulmonary valve, the aortic valve, and part of the aorta.

After the homicide

After defendant got off the bus, he walked to the home of Richard Jimenez. Defendant had known Richard and his family for many years. Richard was not related to

Maria. Richard testified that defendant asked him for a shirt. Richard believed defendant was wearing a shirt at the time. Richard gave him a shirt and defendant left.

The investigation

Detective Kavin Brewer determined the homicide suspect got onto the bus at Pioneer and Fairfax. An open 24-ounce can of King Cobra beer was found on the bus, three rows behind Hernandez's body.

Detective Brewer went to the liquor store that was next to that bus stop and asked the clerk to show him the store's security video. The video showed a man wearing a white shirt purchased the beer at approximately 9:35 a.m.

In the meantime, Gloria, Maria's mother, was at home and saw a news alert on television about an incident on a bus. The news report showed a videotape related to the incident, and Gloria recognized defendant. Gloria went to the location where the bus incident occurred. The detectives were there, and Gloria told them about defendant. Gloria later returned to her house.

Maria eventually walked home after she left the bus. Defendant arrived at the house one or two hours later. Maria told him, "[W]hatever you did, you need to get out of the house." Maria asked defendant what happened. Defendant said, "I can't tell you." Maria told defendant, "[W]hat do you mean you can't tell me? If you can't tell me, just leave." Defendant told Maria, "[D]on't snitch, don't snitch, if you snitch something's gonna happen to you."[2]

Gloria testified that when defendant returned to her house, she did not interact with him and noticed "they were acting real suspicious…. I didn't tell him what was going on or anything."

---

[2] Maria was very emotional at trial and said she did not want to testify because of what defendant told her about snitching after the homicide.

Arrest of defendant

Detective Brewer learned the homicide suspect's name when a woman (later identified as Gloria) approached the deputies while they were at the liquor store and reported that she knew who was responsible for the stabbing. He showed Gloria a photograph of the suspect from the store's security video, and she identified him. Gloria also reported defendant was at her house.

Maria testified that she was still at her house with defendant when a friend called and asked what was going on and said she had seen Gloria talking to the police. Maria left her house to find out what happened. Defendant followed her.

Detectives Brewer and Balasis, who had been watching Gloria's house, immediately arrested defendant when he walked out. Defendant did not have any fresh injuries on his body.

Detective Brewer testified that based on his prior law enforcement training and experience, he did not see any objective signs that defendant was under the influence of methamphetamine or any substances when he was arrested. Defendant did not have slurred speech or an odor of alcohol, he was not talking to himself, and he did not demonstrate any bizarre behavior. He did not have an unsteady gait or balance. Defendant did not engage in rapid speech or rapid physical movements, he was not sweating, and his eyes were not dilated.

DEFENDANT'S POSTARREST INTERVIEW

Around 4:00 p.m. on August 9, 2011, a few hours after the homicide, Detectives Brewer and Balasis interviewed defendant at the sheriff's station after he had been arrested. The prosecutor played the video recording of defendant's interview for the jury.

Miranda advisement

At the beginning of the interview, Detective Brewer informed defendant they were investigating a stabbing on a bus that happened earlier that morning and had information

that he was involved or had information about it. Defendant immediately replied, "I don't know nothing."

Detective Brewer stopped defendant from saying anything else and read the *Miranda*[3] advisements to him. He read each advisement separately and asked defendant if he understood each paragraph. Defendant nodded his head and said yes, in response to each advisement.

After the final advisement, Detective Brewer did not ask defendant if he would waive his rights and/or agree to answer questions. Instead, Brewer asked defendant if he knew anything about the incident. Defendant indicated no and said, "I don't know nothing."

Defendant denies he knows "the girl" or was on the bus

Detective Brewer told defendant they knew he was at a house on Meadows Street with a "girl" and asked for her name.[4] Defendant said he did not know her name. Brewer said the girl's mother was Gloria. Defendant said he was not sure. Brewer asked if he knew about the house on Meadows Street, and defendant said yes. Brewer asked how long he was there; defendant said maybe one hour. Defendant denied spending the night there, and said he arrived at that house early in the morning. Brewer asked if he was there all day or left. Defendant said he was there all day and left for a few minutes to go to the store. Brewer asked if he went to the market at Pioneer and Fairfax, and defendant said yes.

---

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] The detectives initially referred to Maria as "the girl." Defendant repeatedly said he did not know her name until halfway through the interview. We will quote the word used by defendant and the detectives to refer to Maria until he finally admitted he knew her name.

Detective Brewer again asked for the name of the 19-year-old girl who lived at the house. Defendant said he did not know the girl's name. Brewer asked if he knew the boy who lived there. Defendant said he did not know him.

"DETECTIVE BREWER: Why did you go to that house? Are those people friends of yours or …

"[DEFENDANT]: Just visit friends.

"DETECTIVE BREWER: *Who are the friends that you visit there?*

"[DEFENDANT]: *I don't know. I'm not going to tell anybody*.

"DETECTIVE BALASIS: What's that?

"[DEFENDANT]: *I'm not going to say nothing*.

"DETECTIVE BALASIS: *You don't want to throw them—throw them out or what?*

"[DEFENDANT]: *No.*

"DETECTIVE BALASIS: What's that?

"[DEFENDANT]: *I'm not going to say nothing*.

"DETECTIVE BALASIS: Okay. I understand that. But do you know Gloria? The lady that …

"[DEFENDANT]: I …

"DETECTIVE BALASIS: … that owns the house?

"[DEFENDANT]: The lady—that's the lady that lives there with all the kids.

"DETECTIVE BALASIS: The one you call mom?

"[DEFENDANT]: Mm-hm.

"DETECTIVE BALASIS: You call her mom?

"[DEFENDANT]: I call her mom? I don't call anybody mom." (Italics added.)

Defendant said he got a King Cobra beer at the store, he did not go anywhere else, and he went back to the house on Meadows Street. Defendant said he was at the house until the detectives contacted him. He did not remember getting on or riding the bus that same day.

Detective Brewer asked defendant if there was a reason the people in that house "would tell us that you and … the girl left for a while and came back?" Defendant replied, "We just went to the store." Brewer asked why the girl would say they got on a bus that morning. Defendant replied, "[S]he told you that? I don't know." Brewer asked if he got on the bus that morning. Defendant said he did not know, but added, "[s]he says so I guess so."

Detective Brewer asked defendant if he was still involved with the Colonia gang. Defendant stated it had been a long time since he had been involved with the gang.[5]

Detective Brewer asked defendant what he would say if he knew they had pictures of him at the store and "the girl's nowhere around?" Brewer said defendant left the store and walked to the bus stop. Defendant said he did not remember.

> "DETECTIVE BREWER: And you don't remember getting on the bus right there by the apartments?
>
> "[DEFENDANT]: Mm-mm.
>
> "DETECTIVE BREWER: You don't remember?
>
> "DETECTIVE BALASIS: You have, ah, memory problems or something?
>
> "[DEFENDANT]: Yeah.
>
> "DETECTIVE BALASIS: Yeah what kind of memory problems do you have?
>
> "[DEFENDANT]: I'm delirious."

---

[5] There were no gang allegations filed against defendant, and no evidence the victim was involved with any gangs.

The video shows that defendant chuckled when he said, "I'm delirious."

Detective Brewer asked defendant if he knew the buses had very good video cameras. Defendant said no. Brewer asked if it would help if he showed some pictures of him sitting on the bus. Defendant said, "Yeah, if you give me a cigarette." Brewer said the video showed defendant sitting on the bus with the girl and asked if he remembered what happened. Defendant said, "I don't know."

Defendant admits he knows Maria

Detective Brewer asked defendant if he only had one beer that day, and defendant said yes. Defendant said he usually drank four "tall" beers every day, and he also used "dope." Defendant said the girl did not use dope. Brewer asked how long he had known her and if they were dating. Defendant said they were "just friends."

Detective Brewer asked defendant where they were going on the bus. Defendant said they were going "[t]o the police station" to "clear up my name." Brewer asked what that was about. Defendant said he was trying to clear a recent "molest" charge involving that girl. Brewer asked if the police department was investigating it. Defendant said yes, it was recent, and he was trying to clear it.

Defendant admits he was on the bus

Detective Brewer asked if anyone else was at the bus stop. Defendant said no. Brewer asked where he sat on the bus. Defendant said he sat "way in the back" and the girl sat in the front. Defendant said he did not talk to anyone on the bus, he did not recognize anyone, and no one on the bus made him mad. Defendant did not remember talking to the bus driver. Detective Balasis asked if he talked to the driver about how long the stop was going to last. Defendant said, "Oh yeah, I remember saying that," and "I was already trying to hurry up [and] get on." Defendant said the driver never said why it lasted so long.

In response to the detectives' questions, defendant did not remember that the bus driver lowered the ramp to help a lady in a wheelchair. Defendant knew he got off before he reached the police department, but he did not know where or why he got off.

Detective Brewer said the lady in the wheelchair remembered that defendant got off the bus and walked down Pioneer to Tate Street. He asked if defendant also remembered that, and defendant said yes.

Defendant was wearing a black shirt during the interview. Detective Brewer asked defendant if he had been wearing that black shirt all day. Defendant said no and thought he had been wearing a white shirt earlier. Detective Balasis asked what happened to his white shirt. Defendant said he changed because it was dirty. Balasis asked how it got dirty, and defendant said it got wrinkled because he had lain down. Brewer asked if the black shirt belonged to him or if he borrowed it. Defendant said he borrowed it.

Defendant again asked for a cigarette. Detective Brewer said he would get him a cigarette, but they wanted to show him some pictures. Defendant was pleasant, and he laughed when Brewer joked about another detective trying to quit smoking.

Detective Brewer asked if defendant and Maria sat on opposite sides of the bus. Defendant said yes. Defendant said he did not want "to be walking around with, you know, young kids" so he sat behind her. Detective Balasis asked if he eventually sat with the girl. Defendant said yes. Balasis asked if they got off the bus together. Defendant said they got off the bus and went in separate directions because they "just got in an argument and she split."

Detective Brewer again asked defendant why he got off before he reached the police station, and whether he changed his mind about going there. Defendant said he changed his mind and walked back to the house on Meadows Street. Detective Balasis asked if he stopped at a friend's house, and if the friend gave him the shirt. Defendant said he stopped and talked to the friend. Defendant walked to his grandmother's house,

which was also on Meadows Street, and changed his shirt there. He then went to "the girl's" house.

Defendant said he needed a smoke and he was nervous. Detective Balasis asked what he was nervous about. Defendant said it was a bunch of things.

Defendant admits stabbing the victim

The detectives showed defendant still pictures from the bus's security camera that showed defendant stabbing the victim. The following conversation took place:

"DETECTIVE BALASIS: This one here, Maria right? That's Maria right?

"DETECTIVE BREWER: And that's you behind her getting on?

"[DEFENDANT]: Mm-hm.

"DETECTIVE BREWER: Okay.

"DETECTIVE BALASIS: Does that kind of help refresh your recollection as to this morning?

"[DEFENDANT]: Mm-hm.

"DEECTIVE BALASIS: How about this one?

"[DEFENDANT]: Mm-hm.

"DETECTIVE BALASIS: How about this one?

"[DEFENDANT]: Yeah.

"DETECTIVE BALASIS: Do you remember that? How about this one?

"[DEFENDANT]: Yeah.

"DETECTIVE BALASIS: That's you there right?

"[DEFENDANT]: Mm-hm.

"DETECTIVE BREWER: *Who's this guy? Do you know this guy? Have you ever seen him before?*

"[DEFENDANT]: *I believe he was going to blast me so, I (booked) her*.

"DETECTIVE BALASIS: Okay. That's what we've been wanting to find out. (Crosstalk)

"DETECTIVE BALASIS: Can you tell us more about that?

"[DEFENDANT]: No." (Italics added.)

Detective Balasis asked defendant if he got into a confrontation with the victim at the bus stop. Defendant said it was "just a bunch of bull shit."

"DETECTIVE BALASIS: *Well, what did you guys get into it over though. Why were they—why were you afraid*…

"[DEFENDANT]: *I can't say that.*

"DETECTIVE BALASIS: Huh?

"[DEENDANT]: I can't say that.

"DETECTIVE BALASIS: *Okay. So you remember what happened on the bus now? You remember stabbing this guy? Yes*?

"[DEFENDANT]: *Yes.*

"DETECTIVE BALASIS: *Okay. And then your reason for that is what now?*

"[DEFENDANT]: *'Cause he was going to shoot me*." (Italics added.)

Detective Balasis told defendant the victim was unarmed. Defendant disagreed and said the man gave his weapon "to the other guy," and wanted to look at the photographs to see if the other guy was there.

"DETECTIVE BREWER: You went up and talked to the bus driver remember we –we told you? You asked him how long it would have been? *Well, this guy [the victim] see he looks like he's just kind of sitting there texting on his phone, doesn't it – doesn't it? Is that what it looks like to you*?

"[DEFENDANT]: Mm-hm.

"DETECTIVE BREWER: *He's still doing it. And are you talking to him there? Does he say …it doesn't look like he's talking to you but are you talking to him?*

"[DEFENDANT]: Yeah.

"DETECTIVE BALASIS: What were you saying?

"[DEFENDANT]: *Nothing*.

"DETECTIVE BALASIS: *What's going on there*?

"DETECTIVE BREWER: Hey, Ricardo if there's a reason for this you need to tell us okay?

"[DEFENDANT]: *I'm not going to tell you anything*.[6]

"DETECTIVE BREWER: … *I mean, I can't believe you … did this just for nothing you know what I mean? There's got to be a reason. You need to tell us. [T]his guy attack you before*?

"[DEFENDANT]: *I don't have – I don't have a reason*.

"DETECTIVE BREWER: Is this the one that did your nose [referring to an injury on his face]?

"[DEFENDANT]: No." (Italics added.)

The detectives asked why the man would want to shoot him and whether it had anything to do with Maria. Defendant said he did not know. They asked if it had anything to go with "gangs." Defendant said yes.

"DETECTIVE BALASIS: It does? Okay. Is he a rival gang member?

"[DEFENDANT]: *I'm not sure. I'm going to say nothing*.[7]

"DETECTIVE BALASIS: Okay. Well, you say it has something to do with gangs. That makes me think that, you know, it's either a rival gang member or somebody from your own gang that you're having problems with…

"[DEFENDANT]: Yeah, it's my own gang." (Italics added.)

---

6 As will be discussed in issue I, *post*, defendant contends he invoked his right to silence three times during the interview, with this statement marking his first attempt.

7 Defendant claims this statement marked the second time he invoked his right to silence during the interview.

Detective Balasis said it "kind of blows my mind to think that you would just do it for no reason." Defendant said, "I wouldn't do that for a reason – for any reason."

Detective Balasis again asked defendant if he knew the victim. Defendant said he did not know the man. Balasis asked if he thought the man was a Colonia, and defendant said he did not know.

"DETECTIVE BALASIS: *I – I just really like to understand.*

"[DEFENDANT]: *I know you do but, I don't know man.*

"DETECTIVE BALASIS: *Ah, do you truly not know why you did it*?

"[DEFENDANT]: *No, was just like ain't going to say nothing.*

"DETECTIVE BALASIS: *You just don't want to talk about why you did it to him?*

"[DEFENDANT]: *I don't want to talk about it.*[8]

"DETECTIVE BALASIS: Did it have something to do with his way of life and the way he lives?

"[DEFENDANT]: No. I didn't say that—anything about that.

"DETECTIVE BALASIS: No? Do you know his way of life and how he lives?

"[DEFENDANT]: No.

"DETECTIVE BALASIS: No?

"DETECTIVE BREWER: Does he even look like anybody that you know or you might've mistaken him for somebody else?

"[DEFENDANT]: No.

"DETECTIVE BREWER: No? Because I mean Ricardo all we have left to believe if – if this is all you can tell us is that you just randomly got up and

---

[8] Defendant asserts this statement was the third time he invoked his right to silence during the interview.

stabbed some guy on the bus for nothing that you don't even know, some perfect stranger. Is that true?

"[DEFENDANT]: No." (Italics added.)

The detectives asked defendant about his initial claim that he stabbed the man because the man was going to shoot him. Defendant said he did not know about that.

"DETECTIVE BREWER: Well, that's what you said. Is that true? What made you think that? What made you think that that man was going to shoot you? That's what I've got to understand.

"[DEFENDANT]: You won't understand.

"DETECTIVE BREWER: Well, I do. Give me a try at least.

"[DEFENDANT]: I don't really know."

Detective Brewer explained there would be a "certain justification … to doing something like that" if they knew his reasons. Defendant said, "I don't care," and "I don't think you believe it 'cause I don't know." The detectives asked whether he knew the man was armed or threatened him. Defendant said no, and added, "Just leave it the way you guys believe." Defendant finally said, "I might've been mistaken for someone else," but would not explain what he meant.

In response to their questions, defendant said he did not remember how many times he stabbed the man or where he stabbed him. He used a "regular" kitchen knife and got rid of it. He did not get blood on his shirt but changed his shirt because it was sweaty and dirty.

The detectives asked where he dumped the knife and if a child could find it. Defendant offered to show the detectives the location of the knife. The detectives made arrangements to transport defendant to that location and so he could smoke.

Defendant tries to move around his handcuffs

Defendant's hands had been cuffed behind his back during the interview for the safety of the officers. While he was still in the interview room, and just before the

detectives escorted defendant to a car to look for the knife, they realized defendant had shifted his body and legs, and tried to move his hands in front of his body. Another deputy arrived, and they ensured defendant's hands were restrained behind his back. The detectives warned defendant not to do that again.

Defendant takes the detectives to the knife

The detectives escorted defendant to a patrol car. Defendant directed them to a storm drain that was near the bus stop where he stabbed the victim. The detectives found "a large kitchen butcher-type knife" in the drain. The detectives continued to question defendant during this trip, but their conversation was not recorded.

Defendant learns the victim died

About an hour later, after finding the knife, the detectives escorted defendant back to the sheriff's station and conducted the rest of the interview; it was videotaped.

The detectives told defendant that "the girl" said he got into an argument with the victim before they got on the bus. Defendant said that was not true. In response to their questions, defendant said he had used methamphetamine the day before the homicide. Defendant said he did not feel "spun" at that moment and felt "about normal."

Detective Brewer asked defendant if he thought the victim was someone else. Defendant said yes. When asked whether he intended to hurt or kill the man with the knife, defendant said, "Nothing actually."

Detective Balasis told defendant the man was dead. Defendant was surprised, asked if they were serious, and said, "[I]t's f[**]ked up" because "I shouldn't of done that." When asked what he would tell the victim if he was there, defendant said he would say, "I'm sorry."

Defendant's methamphetamine level

At the conclusion of the interview, the detectives decided to have defendant tested for drugs because of his statements that he had used drugs that day.

It was stipulated that defendant tested positive for methamphetamine "at a level indicated to be strong." He did not test positive for any other drugs. He was not tested for alcohol.

PROSECUTION EXPERT TESTIMONY AT GUILT PHASE

Dr. Eric Simon, a clinical and forensic psychologist, testified as a prosecution expert at the guilt phase. He did not interview defendant. Dr. Simon reviewed reports about the incident and from other experts who had examined him.

Dr. Simon explained that narcotics, methamphetamine, and/or alcohol can impair a person's ability to deliberate or form specific intent. A person on methamphetamine could be agitated and anxious since the drug was a stimulant. The person could be intoxicated to such an extreme that it obliterated the person's awareness of what that person was doing, the person's contact with reality, and "essentially their control of themselves" so that the person lacked specific intent.

The prosecutor presented Dr. Simon with a hypothetical that was similar to the facts of this case – a person waiting at a bus stop got into an argument with another person; they both got on the bus; and several minutes later, the first person pulled out a knife and stabbed the second person in the upper chest so that both knife wounds penetrated the victim's heart. Dr. Simon said the first person would have the specific intent to kill because there was "no other conceivable, plausible alternative explanation for that behavior."

Dr. Simon said his opinion would not change if the first person had methamphetamine in his system, and had also been drinking beer or malt liquor, because "it seems obvious that the intention of stabbing a knife at a person's chest with such force would only have one intention, which would be to kill."

On cross-examination, Dr. Simon testified he had reviewed the reports that defendant had consumed a can of "fortified beer," but he did not know defendant tested positive for methamphetamine. Dr. Simon agreed that a person with a "strong presence"

of methamphetamine in his system, who thought people believed he was having a sex with an underaged girl, could have increased levels of anxiety and his thoughts would be affected by the drug. He also could have delusions about the presence of a gun.

DEFENSE EVIDENCE AT THE GUILT PHASE

Defendant did not testify at the guilt phase.

Maria's first pretrial statement

The defense called Deputy Ian Chandler, who testified he served a search warrant at Maria's house and interviewed her about the homicide. Chandler showed Maria a photograph from the bus's video camera that showed defendant standing over the victim with a knife. Maria confirmed she was on the bus with defendant, and he was her boyfriend. Maria said she shouted out when she saw defendant with the knife. As the interview continued, Maria started to cry. Chandler ended the interview and advised Detective Brewer about her initial statement.

Maria's second pretrial statement

Detectives Brewer and Balasis interviewed Maria a few days after the homicide. The defense played the audio recording for the jury.

In response to the detectives' questions, Maria said the victim asked defendant, "[W]ho's his little girl," and defendant said she was his "little home girl," and they were going downtown. Maria thought the victim looked mad, and defendant "looked like he was starting to get mad" about what the victim said. Maria did not know the victim and did not know if defendant knew him.

Maria said defendant was saying "just weird things" most of the day. He became paranoid when he used drugs and believed people were going to kill him. She had seen defendant put knives on his waistband on two other occasions.

Maria said that on the morning of the homicide, defendant acted weird but not paranoid. Defendant kept saying they had to take care of something because he was

going to get killed. Maria did not understand what he meant and asked why people thought she was "a little girl." Maria was tired of people talking behind her back.

The detectives warned Maria that she could be an accessory to the crime and reminded her the homicide was recorded on the bus's video system.

Maria apologized for lying and said she would tell the truth because she did not want to go to jail. Maria said the day before the homicide, they were at her house and defendant was mad and paranoid. Defendant said "he'd kill me. That's when I see those knives." The next morning, defendant told her they had to go to the police station " 'and take care of this because they're gonna kill me.' " Maria said defendant had the knives in his waistband. Maria agreed to go with defendant to take care of it.

Maria said they went to the bus stop, and she asked defendant to get rid of the knives. Defendant said he had to protect himself. Defendant asked for money to buy a beer because he felt shaky. Maria gave him the money, defendant bought the beer, he returned to the bus stop, and drank it. Maria tried to leave but defendant told her they had to take "care of this" so "these guys" would not kill him.

Maria said the man at the bus stop said he was from Lamont and New Stine and asked where they were from. Defendant said he was "from Colonia" and started to argue with the man. Defendant told the man that Maria was the girl " 'that's gettin' me in trouble.' " The man looked at her "all weird." Maria was upset that defendant blamed her for something.

Maria said defendant asked the man "out of nowhere" if he was one of the guys " 'who hate me?' " The guy man replied, " 'Yeah, I do hate you.' " Maria did not understand what they were talking about, and it did not seem like they already knew each other. Defendant got mad.

The bus arrived at the bus stop and Maria, defendant, and the man got on. Maria did not sit near defendant because she thought defendant was going to fight the man.

Maria said defendant got up and talked to the bus driver, and then she heard the man scream. Maria did not realize defendant stabbed him until she saw the man shaking. Maria left the bus through the back door and walked home.

Defendant's drug and alcohol use

Lupita Navarro, defendant's grandmother, testified for the defense that she had cared for defendant since he was an infant. When he was younger, defendant's mother was killed after being stabbed in the chest five times.[9] Navarro thought defendant went through a nervous breakdown after his mother was murdered. He started to use alcohol and drugs.

Navarro testified defendant was always crying. He would lay on the floor and tell her to kill him because he was going to die anyway. Defendant said he heard voices that told him to do terrible things. On two occasions, Navarro called the sheriff's department to take defendant to the hospital because she was frightened by his conduct.

Navarro knew defendant received methadone at a recovery clinic. He also took a pill, possibly Seroquel, that drove him "crazy." When he took that medication, defendant would yell that "they" were after him and going to kill him.

Defendant was still living with Navarro at the time of the homicide. Navarro testified he was having a hard time then because his wife left him, and he was still hearing voices and having crying spells.

The charges, instructions, and convictions after the guilt phase

Defendant was charged with the first degree premeditated murder of Hernandez (Pen. Code, § 187, subd. (a)),[10] and the personal use of a deadly weapon, a knife (§ 12022, subd. (b)(1)). There were no gang allegations.

---

[9] The probation report states that defendant's mother died in 2000.

[10] All further statutory references are to the Penal Code unless otherwise stated.

On January 6, 2016, defendant's trial on the guilt phase began with the People's presentation of evidence.

The jury was instructed on second degree murder and voluntary manslaughter as lesser included offenses.

On January 15, 2016, the jury found defendant guilty of first degree premeditated murder and found the deadly weapon allegation true.

DISCUSSION OF GUILT PHASE ISSUES

I. Defendant's Postarrest Statements were Properly Admitted

Defendant contends the court should have granted his motion to exclude his post-arrest statements because he allegedly claimed his right to silence three separate times during the interview, but Detectives Brewer and Balasis ignored his Fifth Amendment rights and continued to question him.

We have already set forth the entirety of defendant's postarrest interview, above, and noted the three statements which defendant claims constituted an invocation of his right to silence. As we will explain, each of these statements related to his refusal to answer particular questions when considered in the context of the entire interview, and he did not unequivocally invoke his right to remain silent.

A. Defendant's Objections to his Postarrest Statements

Prior to trial on the guilt phase, the People filed a motion in limine to admit defendant's statements from his postarrest interview. Defendant objected and argued the interview should be excluded.

The court conducted a hearing on the motion, and the prosecutor played the entire recording of defendant's interview, as summarized above.

Defense counsel argued the detectives failed to obtain an express waiver from defendant after advising him of the *Miranda* warnings, there was no evidence of an

implied waiver, and the entirety of his postarrest statement should be excluded.[11] The prosecutor replied that an express waiver was not required, and an implied waiver could be found since defendant readily answered the detectives' questions.

Defense counsel further argued defendant repeatedly invoked his right to remain silent during the interview, and pointed to sections where defendant told detectives, "I'm not going to say nothing," "I don't know nothing," and "I'm not going to say nothing." Counsel argued defendant was making unambiguous statements that he was invoking his right to silence, and all questioning should have ceased.

The trial court replied that defendant did not indicate that he wanted to stop talking to the detectives because "[h]e keeps talking. He's like a canary." Counsel replied it did not matter that defendant answered, since the detectives should not have continued to ask him questions.

The prosecutor argued that defendant's statement "about 'I'm not gonna say nothing' " was "not made in respect to questioning," but it was made "when they're talking about identifying the people at Maria Jimenez's house, Maria Jimenez, Gloria Jimenez." The prosecutor continued, "It's not made in respect to questioning. It's made in respect to their trying to get him to identify the people at the house and he says, 'I'm not gonna say nothing.' " The prosecutor further argued:

> "And I believe Detective Balasis even says, 'You're not gonna throw them under the bus,' or words to that effect … you don't want to look like you're snitching people off or getting them involved in your business. It's just sort of a matter of courtesy. That's not an invocation."

---

[11] On appeal, defendant states that counsel "properly conceded that [he] had initially waived his *Miranda* rights when he first spoke with" the detectives, and that it was "a legitimate waiver." We note that prior to trial, defense counsel asserted the entirety of the interview had to be excluded because the detectives failed to obtain an express waiver. The court overruled this objection. Defendant has not renewed this issue on appeal.

The prosecutor asserted that when defendant said, "I don't know nothing," he was denying any knowledge of the crime in response to the detectives' questions. Defendant's responses were "just a denial about having any knowledge of any crime that took place." "[T]he atmosphere itself was definitely not one where they're browbeating him or threatening him. It was actually very, very cordial." The prosecutor concluded: "There isn't anything … that would justify considering any of the defendant's statements as any sort of invocation."

B. The Court's Ruling

The court found that defendant impliedly waived his *Miranda* rights when he started to answer questions, and he did not thereafter invoke his right to remain silent. The court stated:

> "I've had an opportunity to do considerable research on this, and I've had these issues come up before over my career, and I referred to that work on California Criminal Law Procedure & Practice, and in the case of *People vs. Rios*, 179 Cal.App.4th 491, at 499, they point out the issue in ruling on a challenge to a *Miranda* waiver is whether an in-custody accused made an uncoerced and fully aware choice not to assert the right to counsel or silence.
>
> "Our Supreme Court has explained – and this goes over from 499 to page 500 –if the totality of the circumstances surrounding the interrogation –and they put that in inner quotes – reveals both an uncoerced choice and the requisite level of comprehension, a court may properly conclude that the *Miranda* rights have been waived. Once it is determined that a suspect's decision not to rely on his rights was uncoerced and that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intentions to use the statements to secure a conviction – which implicitly he indicated he wasn't going to be able to leave the situation – the analysis is complete and the waiver is valid as a matter of law.
>
> "But I looked further at the totality of the circumstances to see if there's any coercion. I look at his body language. I look at his verbal responses. And I find a definite implied waiver, no coercion, no invocation, and his statement … in its totality may come in."

Defense counsel objected and argued that even if there was a legitimate implied waiver at the beginning of the interview, the court failed to address whether defendant repeatedly claimed his right to silence as the interview continued since defendant responded to questions by saying, " 'I don't wanna talk. I don't wanna say nothing.' That's an unequivocal statement that questioning must cease."

The court replied that defendant's statements had to be considered in the context of the detectives' questions, and when defendant said, "I'm not going to say nothing," this remark was "in the context of I'm not going to tell anybody who the friends are…."

C. Invocation of the Right to Silence

"[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 388–389.)

"In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must *unambiguously*' assert his right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda* … either to ask clarifying questions or to cease questioning altogether. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 535; *People v. Martinez* (2010) 47 Cal.4th 911, 948; *Berghuis v. Thompkins*, *supra*, 560 U.S. at pp. 381–382.)

The context in which the defendant's statements are made is relevant because "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." (*Smith v. Illinois* (1984) 469 U.S. 91, 98, fn. omitted; *People v. Martinez*, *supra*, 47 Cal.4th at p. 951.) "Whereas the question whether a waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind," evaluating a subsequent "asserted invocation must include a consideration of the communicative aspect of the invocation – what would a *listener* understand to be the

defendant's meaning." (*People v. Williams* (2010) 49 Cal.4th 405, 428.) The latter inquiry is an objective one. (*Ibid*.) Accordingly, in the postwaiver context, the "question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying." (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126.)

"A defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 115, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.) "A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.' [Citation.]" (*People v. Silva* (1988) 45 Cal.3d 604, 629–630.)

" 'Whether the suspect has indeed invoked that right, however, is a question of fact to be decided in the light of all the circumstances ....' [Citation.] We have also said that ' "[a] desire to halt the interrogation may be indicated in a variety of ways," ' [citation] and that the words used ' "must be construed in context." ' [Citation.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.)

"In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

D. The Context of Statements Made During an Interview

A series of cases have examined situations where defendants were advised of the *Miranda* warnings, gave valid initial waivers, and then claimed they invoked their right to silence during the interviews.

For example, in *People v. Ashmus* (1991) 54 Cal.3d 932 (overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117), officers were investigating the sexual assault and murder of a girl. The defendant waived his right to silence and answered questions. The officer said that someone saw the defendant with "a little girl." The defendant replied, " '[N]ow I ain't saying no more,' " and " 'I'm not gonna get accused of somethin'…' " The defendant kept talking and said he would not " 'hurt a fly or kill a fly, I'm sorry, don't say no more ….' " The officer said nobody was talking about killing, continued asking questions, and defendant answered. (*People v. Ashmus*, at pp. 968–969.) *Ashmus* held the trial court properly denied the defendant's motion to suppress because "[w]ithin their context – clearly in the transcript and more clearly still on the audiotape – defendant's words cannot reasonably be deemed an invocation of his right to silence. He spoke to his interrogators; he uttered the words in question; and without hesitation he proceeded to speak to them further. He evidently sought to alter the course of the questioning. But he did not attempt to stop it altogether." (*Id*. at pp. 969–970.)

In *People v. Silva*, *supra*, 45 Cal.3d 604, the defendant was asked about suspects in a murder investigation. When asked if he saw a certain person's truck, or if he was driving that vehicle, the defendant replied, " 'I don't know. I really don't want to talk about that.' " The interview continued, and the defendant answered other questions. (*Id*. at p. 629.) *Silva* affirmed the trial court's denial of the defendant's suppression motion and agreed with the trial court's finding that the defendant was " '*not even intimating that he wished to terminate the interrogation*,' " and instead showed his unwillingness to discuss that particular subject. (*Id*. at pp. 629–630.)

In *People v. Musselwhite*, *supra*, 17 Cal.4th 1216, the defendant was advised of the *Miranda* warnings and interviewed about his involvement in a murder. The detective told the defendant that he would have to think clearly about what was best for him. The defendant replied, " 'I don't know what you, *I don't want to talk about this.* You all are

getting me confused. (inaudible) I don't even know what you're all talking about. You're getting[,] you're making me nervous here telling me I done something I ain't done. Kill somebody, come on, give me a break.' (Italics added.)" (*Id.* at p. 1239.) The detective continued to ask questions about the murder, and the defendant answered. *Musselwhite* agreed with the trial court's findings that the defendant's statements, considered in context, showed his reluctance to address a specific topic, and he was not invoking his right to silence. (*Id*. at pp. 1239–1240.)

In *People v. Williams*, *supra*, 49 Cal.4th 405, an officer showed the murder victim's photograph to the defendant. The defendant said he did not know her. In response, the officer asked how the defendant met her and what they did on the night of the crime. The defendant replied, " 'I don't want to talk about it.' " (*Id*. at p. 433, italics omitted.) The officer encouraged the defendant to tell him, and the defendant again said he did not know her. (*Ibid*.) *Williams* held that when viewed in context, the defendant's statement that he did not want to talk about it, was not "an unambiguous invocation of the right to remain silent," and instead an expression of frustration with the officer's refusal to accept the defendant's repeated denials that he did not know the victim. (*Id*. at pp. 433–434.) "A reasonable officer could interpret defendant's statement as comprising part of his denial of any knowledge concerning the crime or the victim, rather than an effort to terminate the interrogation. [Citation.]" (*Id*. at p. 434.)

E. Analysis

Defendant complains the trial court mistakenly believed he was only challenging whether he initially waived his rights at the beginning of the interview and failed to address his claim that he invoked his right to silence during the interview. As noted above, defendant raised both issues at the suppression motion, and the court addressed both arguments – it found defendant gave an implied waiver at the beginning of the interview, and that he did not invoke his right to silence during the interview: "He keeps talking. He's like a canary." The court further found defendant's statements had to be

considered in the context of the detectives' questions, and when defendant said, "I'm not going to say nothing," this remark was "in the context of I'm not going to tell anybody who the friends are…."

Defendant asserts that while he gave an implied waiver at the beginning of the interview, he repeatedly claimed his right to silence as the interview continued. Defendant cites three specific sections of the interview, where he responded to certain questions by saying, " 'I'm not going to tell you anything,' " " 'I'm going to say nothing,' " and " 'I don't want to talk about it.' " Defendant asserts that by making these statements, he was invoking his right to silence but the detectives illegally ignored his invocations and improperly continued to question him.

As we have explained, however, the context of a defendant's statements may show that he is indicating "an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.' [Citation.]" (*People v. Silva*, *supra,* 45 Cal.3d at pp. 629–630.) While defendant made statements that he did not want to talk about certain things, and he was not going to say anything, the entirety of the record clearly shows that in the context of the interview, defendant was refusing to answer particular questions by the detectives and he was not invoking his right to silence.

Defendant spent the first part of the interview denying he knew Maria's name or her family, or that he was on a bus that day. When pressed for the name of the family, he said he was not going to tell anyone and indicated he did not want to give their name to the police. Once the detectives advised defendant about the bus's security camera, defendant admitted he was on the bus with Maria and said they were going to the police department but continued to deny that anyone else got on the bus with them or that he argued with someone. Defendant claimed he got off the bus with Maria because they argued. Defendant was then advised that the bus's video camera showed him attacking the victim. Defendant admitted something happened and the other man was going to shoot him.

When the detectives asked why he attacked the victim, defendant said, "I'm not going to tell you anything" and added "I don't have a reason." Defendant said it had something to do with gangs, and the detectives asked if the man was in rival gang.[12] Defendant said, "I'm not sure. I'm going to say nothing," and then added, "it's my own gang." The detectives said they wanted to understand what happened. Defendant said he did not know why he did it, and "ain't going to say nothing." The detective asked defendant if he "[j]ust don't want to talk about why you did it to him," and defendant replied, "I don't want to talk about it." Defendant was asked why he thought the man was going to shoot him. He replied, "You won't understand." The interview continued with defendant's attempt to move around in his handcuffs, his agreement to show the detectives where he dumped the knife, and his surprise that the victim had died.

As in *Silva* and *Williams*, defendant's statements showed he was unwilling to answer particular questions, but his statements did not constitute unequivocal invocations of his right to remain silent. The record supports the trial court's factual findings, and shows that in the context of the interview, defendant did not unambiguously invoke his right to silence when he made those statements.

II. Voluntary Intoxication and Consciousness of Guilt Instructions

The jury was instructed that it could infer defendant's consciousness of guilt if it found he knowingly gave false statements, referring to his postarrest interview. The jury was also instructed that defendant's alleged voluntary intoxication and/or mental impairment could only be considered to determine if he formed premeditation or the specific intent to kill.

Defendant asserts the court violated his due process rights and committed prejudicial error when it failed to modify these instructions to state that the jury could

---

[12] We again note that there was no evidence the victim was connected to any gangs.

also consider his voluntary intoxication and/or mental impairment as relevant to decide whether the defendant "made the false statements *knowing* they were false." (Italics added.) Defendant argues the instructional error violated his due process rights and requires reversal because the jury could have inferred consciousness of guilt from statements made while he was under the influence, which would negate the presumption that he knowingly gave false statements.

Defendant acknowledges he did not raise this objection at trial but argues the court's alleged instructional error violated his substantial rights.

A. The Instructions

The jury was instructed on the charged offense of first degree premeditated murder; the lesser included offenses of second degree murder; and another lesser offense of voluntary manslaughter based on either heat of passion or imperfect self-defense.

During the instructional conference, the court considered the prosecutor's request to instruct the jury as follows with CALCRIM No. 362, consciousness of guilt and false statements:

> "If the defendant made a false or misleading statement before this trial relating to the charged crime, *knowing the statement was false or intending to mislead*, that conduct may show that he was aware of his guilt and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance; however, evidence that the defendant made such a statement cannot prove guilt by itself." (Italics added.)

Defense counsel objected to CALCRIM No. 362 based on his prior *Miranda* argument and again asserted the entirety of defendant's postarrest interview should have been excluded. The court noted that it had denied defendant's motion to exclude, denied this objection, and defendant did not raise any other objections to this instruction.

The court next discussed whether to give CALCRIM No. 625 on voluntary intoxication, which states:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation or the defendant acted with the purpose, intent, knowledge, or harbored express malice aforethought when the defendant committed the act or crime.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance, knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. *You may not consider evidence of voluntary intoxication for any other purpose.*

"Voluntary intoxication is not a defense to voluntary manslaughter or implied malice aforethought as required for a conviction of murder in the second degree." (Italics added.)

Defense counsel initially agreed to this instruction. Later, in the instructional conference, defense counsel objected to the last section of CALCRIM No. 625, as italicized above, but did not argue it was inconsistent with CALCRIM No. 362.

Defense counsel requested an additional instruction that addressed "brain problems caused by long-term abuse" instead of just intoxication "on a one-shot basis." After an extensive discussion between the court and the parties, the court agreed to defendant's request to give CALCRIM No. 627 on hallucinations, which states.

"A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing something that is not actually present or happening. *You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation*.

"A hallucination may negate deliberation and premeditation so as to reduce a first-degree murder to murder in the second degree; however, a hallucination may not be the sole basis for reducing a murder charge to voluntary manslaughter.

"The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder." (Italics added.)

The court next considered whether to give CALCRIM No. 3428 on mental impairment. Defense counsel agreed. The instruction states:

> "[Y]ou have heard evidence that the defendant may have suffered from a mental disease or disorder. *You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime*. The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state; *specifically, premeditation, deliberation, malice aforethought, and the specific intent to kill*. If the People have not proved this beyond a reasonable doubt, you must find the defendant not guilty of murder in the first degree." (Italics added.)

B. Forfeiture/Substantial Rights

We first note defendant did not object to these instructions at trial and has forfeited review of any claimed errors. However, defendant contends this court must review his claims because the alleged instructional errors affected his substantial rights.

"Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927; *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1203 (*McGehee*).)

" 'In this regard, "[t]he cases equate 'substantial rights' with reversible error" under the test stated in *People v. Watson* (1956) 46 Cal.2d 818…. [Citation.]' [Citations.] 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim ....' [Citation.]" (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.)

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citations] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

We thus turn to the merits of defendant's arguments.

C. Wiidanen *and* McGehee

Defendant's claim of instructional error is based on two cases, which held that evidence of a person's voluntary intoxication and/or mental impairment was relevant to determine whether he knowingly gave false statements.

In *People v. Wiidanen* (2011) 201 Cal.App.4th 526 (*Wiidanen*), the defendant was convicted of sexually assaulting an unconscious person after a New Year's Eve house party. There was evidence that the defendant was intoxicated at the time of the crime. When interviewed by police a few hours later, the defendant said he was intoxicated and could not remember the party, but repeatedly denied the allegation and was sure he did not do it. The defendant's DNA was found on the victim. (*Id*. at pp. 528–530.)

Wiidanen held the court erroneously instructed the jury with CALCRIM No. 362, consciousness of guilt by knowingly making false statements, and CALCRIM No. 3426, the voluntary intoxication instruction, because the instructions told the jury it could consider evidence of the defendant's voluntary intoxication only to decide if he knew the victim was unconscious at the time of the act. *Wiidanen* held the instructions erroneously prevented the jury from considering whether the defendant was able to knowingly give false statements to police, and therefore constituted evidence of his consciousness of guilt. (*Wiidanen, supra*, 201 Cal.App.5th at pp. 532–533.)

> "This prohibition was error because a defendant's false or misleading statements made when he was intoxicated may not be probative of the defendant's veracity, *if the jury believed the defendant was too intoxicated to know his statements were false or misleading*. ' "[I]ntoxication has obvious relevance to the question of awareness, familiarity, understanding and the ability to recognize and comprehend." ' [Citation.] Here, for example, defendant made various statements to police a few hours after the incident that were false, even under defendant's theory of the case at trial. He repeatedly told police he did not orally copulate anybody at the party. If the jury believed that defendant made false statements such as these to police, it should have been allowed to consider whether he was intoxicated at the time he made those false statements and whether his intoxication prevented him from knowing those statements

were false. If the jury so believed, those statements would not have been probative of defendant's consciousness of guilt." (*Id*. at p. 533, italics added.)

While *Wiidanen* found instructional error, it rejected defendant's claim that erroneous instructions created an " 'irrational permissive inference' in violation of due process." (*Wiidanen, supra*, 201 Cal.App.4th at p. 533.)

> "There was no due process violation here, because the 'suggested conclusion,' i.e., defendant was aware of his guilt when he made the false statements, was reasonable 'in light of the proven facts before the jury.' The People proved that defendant's DNA, most likely from his saliva, was found [on the victim's body]. '[E]mbrac[ing]' that the 'DNA evidence [w]as irrefutable,' defense counsel then argued to the jury the oral copulation was consensual. Therefore, defendant's statements to police that he did not orally copulate anybody at the party were false. *It was not reasonable that defendant made these false statements due to his intoxication (and therefore without knowledge they were false) because, as pointed out by the prosecutor during closing argument, defendant selectively remembered certain things about what allegedly happened at the party that, if believed, would exculpate him (i.e., he did not orally copulate anybody) but claimed a hazy memory about other facts (i.e., whether he returned to the house that night) that would not necessarily inculpate or exculpate him*. That defendant had the ability to fake a clear memory about events that exculpated him and to fake a hazy memory about neutral facts suggested defendant knew how to contrive even while allegedly drunk. Therefore, the permissive inference, i.e., defendant was aware of his guilt when he made the false statements, was reasonable, and the court did not violate defendant's due process rights by giving these instructions." (*Id*. at p. 534, italics added, fns. omitted.)

Wiidanen held the same rationale supported the conclusion that the instructional error was not prejudicial under *Watson*. (*Wiidanen, supra*, 201 Cal.App.4th at p. 534.)

In *People v. McGehee, supra*, 246 Cal.App.4th 1190, the court relied on *Wiidanen* and reached a similar decision on the mental impairment instruction.[13] The defendant stabbed his mother multiple times and killed her, and there was evidence that he was

---

[13] *Wiidanen* and *McGehee* were both decided by the Third District. (*Wiidanen, supra*, 201 Cal.App.4th at p. 526; *McGehee, supra*, 246 Cal.App.4th at p. 1190.)

mentally disturbed when he did so. He was charged with first degree premeditated murder and pleaded not guilty and not guilty by reason of insanity. He was convicted of second degree murder as a lesser included offense, and found sane at the time of the offense. (*Id*. at p. 1194.)

At the guilt phase in *McGehee*, the jury was instructed on consciousness of guilt from knowingly making false statements (CALCRIM No. 326), and the limited use of evidence of mental impairment on the murder charge (CALCRIM No. 3428). (*McGehee*, *supra*, 246 Cal.App.4th at pp. 1203–1204.) The defendant did not object to the instructions but argued on appeal they should have been modified to allow the jury to consider evidence of his mental disturbance to determine whether his postarrest statements were knowingly false. (*Id*. at p. 1204.)[14]

McGehee relied on *Wiidanen* and held CALCRIM No. 3428 improperly prohibited the jury from considering evidence of the defendant's mental illness or impairment "for any purpose other than deciding whether he possessed the required mental state for murder." (*McGehee*, *supra*, 246 Cal.App.4th at p. 1204.)

> "Like intoxication, mental illness or impairment has obvious relevance to the question of ability to perceive or recall events. [Citations.] Here, defendant presented evidence he was suffering from insane delusions at the time he stabbed his mother to death. Shortly after the murder, as [his sister] was trying to reach her mother to pick her up …, defendant called [his sister] and said their mother had asked him to pick her up. Later that night, defendant stopped [his sister] in the hallway and told her their mother was asleep. The next morning, defendant told [his sister] their mother got up early, asked defendant to take [his sister] to run an errand at the bank, and then said she would be staying in bed all day because she had not slept well. None of these statements was true. *If defendant knew them to be false, they would be evidence of his consciousness of guilt. If, however,*

---

[14] *McGehee* held that the defendant forfeited review by failing to object to the instructions but addressed the issue on the merits based on the defendant's alternate argument that the alleged instructional error violated his substantial rights. (*McGehee*, *supra*, 246 Cal.App.4th at p. 1203.)

defendant's mental illness or impairment prevented him from knowing those statements were false, the statements would not have been probative of his consciousness of guilt. The jury should have been allowed to consider the evidence of defendant's mental illness or impairment for purposes of assessing consciousness of guilt. [Citation.]" (*Ibid*., italics added.)

As in *Wiidanen*, however, *McGehee* found the instructional error did not create "an 'irrational permissive inference' " in violation of his due process rights. (*McGehee*, *supra*, 246 Cal.App.4th at p. 1205.)

"Here … the suggested conclusion defendant was aware of his guilt when he made the false statements at issue in this case was reasonable in light of the proven facts before the jury. Indeed, we conclude such a conclusion was more reasonable in this case than in *Wiidanen* …. In addition to making the false statements, defendant engaged in a concerted effort to keep [his sister] away from their deceased mother. He picked [his sister] up … and, rather than drive her home, defendant took her on a four-hour road trip to Sacramento, purportedly to pick up marijuana. When [his sister] mentioned her lips were chapped, defendant stopped at Walgreens to allow her to purchase Blistex, which was contrary to his usual reluctance to do things for people. He then paced the aisles when [his sister] was in the restroom. Back on the road, defendant drove back and forth down the same street, claiming to be lost. When he eventually arrived at the purported location, defendant parked the car and disappeared on foot. Defendant did not drive [his sister] back to the house until after the time their mother usually retired to her bedroom, which gave defendant the pretext to tell [his sister] not to disturb her while she slept. Defendant also seemed to be patrolling the hallway that night. The following day, defendant told [his sister] their mother got up early and told him she would be staying in bed all day, but she wanted him to take [his sister] to run an errand at the bank. While defendant and [his sister] ran that errand, defendant also asked if [his sister] wanted to go to Target to just walk around. Finally, when [his sister] said she did not need to go to Target, but wanted to go to the AT&T store on the way back to the house, defendant suggested they go to a different store location, farther from the house. *There would be no reason for defendant to have engaged in this effort to keep [his sister] away from their mother if he actually believed she were alive. Thus, the permissive inference that defendant was aware of his guilt when he made the false statements was reasonable, and the trial court did not violate his due process rights by giving the challenged instructions*." (*Id*. at p. 1206, italics added.)

McGehee concluded the instructional error was not prejudicial for the same reasons and, as a result, defendant's substantial rights were not affected. (*McGehee, supra,* 246 Cal.App.4th at p. 1206–1207.)

D. Section 29.4 and Soto

Before addressing the merits of defendant's instructional claims, we note that the bench notes to CALCRIM No. 3426 cite *Wiidanen* and state that a trial court "may need to modify this instruction if given with CALCRIM No. 362, Consciousness of Guilt" (Judicial Council of Cal., Crim. Jury Instns. (2019) CALCRIM No. 3426, p. 1066).

However, *Wiidanen* fails to address how the voluntary intoxication defense applies to determining whether the defendant made false or misleading statements. Such an application is not included in section 29.4, subdivision (b), which limits the use of voluntary intoxication. The statute states:

> "Evidence of voluntary intoxication is admissible *solely* on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Italics added.)

The plain language of section 29.4, subdivision (b) does not include admitting voluntary intoxication on the issue of whether defendant knowingly gave false statements.

In addition, it is questionable whether *Wiidanen's* holding survives *People v. Soto* (2018) 4 Cal.5th 968 (*Soto*), where the California Supreme Court held that section 29.4, subdivision (b) does not permit evidence of voluntary intoxication on the question of whether a defendant believed it was necessary to act in self-defense. *Soto* held CALCRIM No. 625 "correctly permits the jury to consider evidence of voluntary intoxication on the question of whether defendant intended to kill but not on the question of whether he believed he needed to act in self-defense." (*Soto,* at p. 970.) In reaching this conclusion, *Soto* explained:

> "Because express malice requires an intent to kill 'unlawfully' (§ 188), defendant argues the Court of Appeal was correct when it held that

> section 29.4 permits evidence of voluntary intoxication on the question of whether he actually believed in the need for self-defense, that is, whether he intended to kill *unlawfully*.
>
> "… By its terms, subdivision (b) [of section 29.4] permits evidence of voluntary intoxication 'solely' on the question of whether the defendant 'formed a required specific intent,' 'premeditated,' 'deliberated,' or 'harbored express malice aforethought.' *Because harbored implied malice does not appear in this enumerated list, section 29.4 prohibits the use of evidence of voluntary intoxication to establish that a defendant acted without implied malice*. [Citations.]" (*Id.* at p. 975, first italics in original, second italics added.)

Soto concluded the text of section 29.4, subdivision (b) did not clearly support the defendant's proposed reading of the statute, and "[t]he Legislature has decided, for policy reasons, that evidence of voluntary intoxication is irrelevant to proof of certain mental states. The Legislature may validly make that policy decision." (*Soto*, *supra*, 4 Cal.5th at pp. 976, 981.)

It would appear that a similar analysis would lead to the conclusion that the language of 29.4 does not support applying voluntary intoxication to the determination of whether a suspect knowingly made false statements.

E. Analysis

Even assuming *Wiidanen* and *McGehee* apply in this case, and the jury should have been instructed that it could consider defendant's possible voluntary intoxication and/or mental impairment on the question of whether he knowingly gave false statements in his postarrest interview, defendant's due process rights were not violated, and any instructional error is not prejudicial.

The failure to allow the jury to consider defendant's intoxication in determining whether he knowingly made any false or misleading statements is not grounds for reversal if, based on the facts adduced at trial, it is reasonable to infer defendant was aware of his guilt at the time he made the statements. (*Wiidanen*, *supra*, 201 Cal.App.4th at pp. 533–534.) No due process violation will be found if the evidence shows the

statements in question were designed to deceive, as opposed to simply reflecting the meaningless ramblings of someone who is too intoxicated to really know what they are talking about. (*Ibid*.)

As in *Wiidanen* and *McGehee*, the jury in this case could reasonably infer that defendant was aware of his guilt when making false statements. (*Wiidanen, supra,* 201 Cal.App.4th 534.) In the short time between stabbing Hernandez twice in the heart and being arrested, defendant was engaged in activities designed to cover up his criminal conduct. Immediately after he stabbed the victim, he told Maria they had to get off the bus. Maria walked home but defendant headed to a nearby house of a longtime friend, said he needed a shirt, and changed out of his white shirt and put on the new black shirt, either to change his appearance or perhaps because there was blood on his white shirt.

Defendant returned to Maria's house one or two hours after the murder. Maria told him that he had to leave, but also asked what happened. Defendant said he could not tell her. Maria again told him to leave. Maria testified that defendant warned her, "[D]on't snitch, don't snitch, if you snitch something's gonna happen to you." Defendant's warning had such an impact on Maria that she was very emotional at trial and said she did not want to testify because of what defendant told her about snitching after the homicide.

Shortly after defendant warned Maria, she left the house and he followed her. He was arrested outside. Detective Brewer testified he did not see any objective signs that defendant was under the influence of methamphetamine or any substances at the time of his arrest, and he did not demonstrate any bizarre behavior.

More importantly, there is no evidence defendant's voluntary intoxication affected his responses during the postarrest interview. Defendant was calm and cooperative, able to express himself, and even tried to maneuver out of his handcuffs. He selectively answered questions that would exculpate him and repeatedly denied inculpatory facts, such as that he was with "a girl," he knew her name or that of her family, or that he had

even been on a bus. When the detectives showed him the still photographs from the bus's security video, defendant finally admitted he had been on the bus, but denied that he met anyone at the bus stop or he asked the bus driver any questions. Again, the detectives advised defendant of the bus's surveillance video and showed him the photographs, and defendant claimed the guy on the bus had a weapon and purportedly passed it to another guy.

Defendant's conduct and statements suggest he knew enough to cover up his violent stabbing of Hernandez, change his clothes, threaten the only eyewitness, deny he knew her, claim he had never been on a bus or met anyone there, and continued with his denials until advised that his conduct was filmed on the bus's surveillance video and he was shown the photographs of the stabbing. Despite his alleged voluntary intoxication and/or mental impairment, the jury could reasonably infer he knowingly made false statements intended to deceive. As in *McGehee*, "the permissive inference that defendant was aware of his guilt when he made the false statements was reasonable, and the trial court did not violate his due process rights by giving the challenged instructions." (*McGehee*, *supra*, 246 Cal.App.4th at p. 1206.)

Finally, defendant's defense was that his alleged intoxication and/or mental impairment prevented him from having both premeditation and the specific intent to kill. The fact that the jury convicted defendant of first degree premeditated murder indicates it found defendant was not so intoxicated or suffering from a mental impairment that rendered him unable to form the required intent to commit the offense.

We thus conclude that if the jury found defendant made false or misleading statements to the detectives during the post-arrest interview, it was reasonable for the jury to apply the "permissive inference," that he knowingly made false statements and he was aware of his guilt when he made those statements, and the court did not defendant's due process rights by giving these instructions without modification. For the same reason, any instructional error was harmless since it is not reasonable probable that a result more

favorable to defendant would have been reached in the absence of the error. (*Wiidanen*, *supra*, 201 Cal.App.4th at p. 534; *McGehee*, *supra*, 246 Cal.App.4th at pp. 1206–1207.)

III. Voluntary Intoxication and Manslaughter Instructions

Defendant next contends that CALCRIM No. 625, which states that voluntary intoxication may only be considered to determine if defendant acted with premeditation or had the specific intent to kill, or acted with express malice, improperly prevented the jury from determining whether voluntary intoxication applied to his claims of imperfect self-defense and/or heat of passion relating to manslaughter.

In raising these arguments, defendant relied on the appellate court's decision in *People v. Soto* (2016) 248 Cal.App.4th 884, which had a petition for review pending at the time of the initial briefing in this case. (*Ibid*., review granted Oct. 12, 2016, S236164.)

In his reply brief, defendant concedes the California Supreme Court has resolved this issue adversely to his position in *Soto*, *supra*, 4 Cal.5th 968, and reasserts the issue to preserve future federal review.

PART II

THE SANITY TRIALS

At the guilt phase, defendant was convicted as charged of first degree premeditated murder with a deadly weapon enhancement.

We now turn to the two sanity trials held in defendant's case, that culminated in the court finding that defendant was sane at the time of the murder. Before we address the evidence, we briefly review the applicable law when a defendant pleaded not guilty, and not guilty by reason of insanity.

At the guilt phase, the People must prove all the elements of the charged offense, including mens rea, beyond a reasonable doubt. The defense cannot claim insanity at the guilt phase. Evidence of a mental disease, defect, or disorder is admissible " 'solely on the issue of whether or not the accused actually formed a required specific intent,

premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.' [Citations.]" (*People v. Mills* (2012) 55 Cal.4th 663, 671–672 (*Mills*).)

If the defendant is found guilty of the charged offense, the trial then continues to the sanity phase. (*Mills*, *supra*, 55 Cal.4th at p. 671.) A finding that the defendant has the required mental state and is guilty of the charged offense does not foreclose a subsequent finding of insanity. (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.) (*Hernandez*).)

A defendant who proceeds at trial on a plea of not guilty by reason of insanity has the burden of proving, by a preponderance of the evidence, that he or she was legally insane at the time of the underlying offense. (§ 25, subd. (b); *Hernandez*, *supra*, 22 Cal.4th at p. 521.)[15] In contrast to the guilt phase, the defendant begins the presentation of evidence at the sanity trial since he has the burden of proving he was insane at the time of the offense. (*Hernandez*, at p. 521; *Mills*, *supra*, 55 Cal.4th at p. 672.)

"Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong. [Citations.]" (*Hernandez*, *supra*, 22 Cal.4th at pp. 520–521; *Mills*, *supra*, 55 Cal.4th at p. 671; *People v. Elmore* (2014) 59 Cal.4th 121, 140.) " 'If [a] mental illness is manifested in delusions which render the individual incapable either of knowing the nature and character of his act, or of understanding that it is wrong, he [or she] is legally insane' " under California law. (*People v. Blakely* (2014) 230 Cal.App.4th 771, 780.)

" '[T]he issue at the insanity trial is not whether in fact the defendant has committed the act but whether or not he should be punished.' [Citation.]" (*Hernandez*, *supra*, 22 Cal.4th at p. 522.) The defendant may suffer from a diagnosable mental illness

---

[15] In issue II, *post*, we will address defendant's contention that the court improperly presumed defendant was sane and shifted the burden to defendant to prove he was insane.

without being legally insane. (*Mills*, *supra*, 55 Cal.4th at p. 672.) In addition, insanity cannot be based upon the "addiction to, or abuse of, intoxicating substances." (§ 29.8.) As a result, the finder of fact at the sanity phase may find the defendant was legally sane if it believed he suffered from a mental state caused from the voluntary ingestion of drugs or alcohol. (*Ibid*.; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427.)

Thus, the trier of fact in a sanity trial must determine (1) whether, based on a mental disease or defect, the defendant was incapable of (2) knowing or understanding the nature and quality of his acts or (3) distinguishing right from wrong when he murdered the victim on the bus in this case. (*People v. Blakely*, *supra*, 230 Cal.App.4th at p. 779.)

PROCEDURAL BACKGROUND

On October 26, 2011, shortly after the complaint was filed, the court granted defense counsel's request for appointment of an expert to evaluate defendant for a confidential report pursuant to section 1017. The court appointed Dr. Eugene Couture to examine defendant.

As later revealed by the defense, Dr. Couture's report stated his preliminary opinion that defendant may have been insane at the time of the crime and there were questions about his sanity that should be investigated.

On or about August 16, 2012, the information was filed. Defendant pleaded not guilty, and not guilty by reason of insanity. The court appointed Dr. Gary Longwith and Dr. Luis Velosa to examine defendant pursuant to section 1027.

The People later retained Dr. Eric Simon to review the report prepared by Dr. Couture.

The guilt phase

Prior to the start of defendant's jury trial in the guilt phase, defense counsel made numerous attempts to have Dr. Couture appear but learned he had moved out of state and

was seriously ill. The court ultimately determined Dr. Couture was medically unavailable to appear.

On November 19, 2015, the court appointed Dr. Michael Musacco to examine defendant because of Dr. Couture's unavailability.[16]

On January 6, 2016, the guilt phase began with the People's introduction of evidence. As set forth in part 1, *ante*, the People called Dr. Simon to testify about voluntary intoxication, and premeditation and intent to kill. The defense did not call any experts to testify at the guilt phase.

On January 16, 2016, the jury found defendant guilty of first degree murder and the weapons enhancement was found true.

The first sanity trial

On January 19, 2016, the sanity phase of defendant's trial began in front of the same jury. Judge Friedman, who presided over the guilt phase, also conducted the first sanity trial. As we will set forth below, the defense called four experts; the People did not call any witnesses.

On January 22, 2016, the jury advised the court it was unable to reach a unanimous decision on the sanity issue, and the court declared a mistrial.

Second sanity trial

On November 28, 2016, defendant waived his right to a jury trial for the second sanity trial.

In December 2016 and April 2017, defendant's second sanity trial was held before Judge Brehmer, who did not conduct the guilt phase or the first sanity trial. The parties agreed that the court could review the entire transcript from the prior proceedings. The

[16] As we will explain below, Drs. Velosa, Musacco, Longwith, and Simon each concluded defendant was not legally insane at the time of the crime.

defense recalled three experts from the first trial, and the prosecution called one new witness.

SANITY TRIAL EVIDENCE

We now turn to the evidence introduced at both sanity trials that the court considered when it found defendant sane after the second sanity trial.

Defendant's grandmother

Lupita Navarro, defendant's grandmother, testified both her own sister and grandmother had experienced mental health problems. Navarro testified that when defendant was a young child, he would sometimes see and hear things that others could not. Navarro had him taken to the Kern Medical Center's mental health ward for his mental problems on prior occasions.

Defendant's attempted suicide

The defense introduced evidence that on August 30, 2011, defendant was in custody at the Lerdo max-med facility after being arrested in this case. Deputy Alicia Garrido discovered defendant was hanging from a bed sheet tied to the cell's bars. Defendant's feet were on the floor, but he was unconscious and purple. He was removed from the bars and initially unresponsive and not breathing. Defendant started breathing on his own as medical personnel arrived.

Dr. Simon

Dr. Simon, who had been retained by the People and testified at the guilt phase, was called by the defense at first sanity trial.[17] He did not examine defendant, but instead reviewed prior reports from Dr. Couture and Dr. Velosa. He also reviewed the sheriff's report, incident reports from the jail following defendant's arrest, and defendant's prior jail bookings.

---

[17] The defense called Dr. Simon to testify at the first sanity trial and asked about his disagreements with Dr. Couture's report, in an apparent effort to have the jury hear that Dr. Couture gave an initial diagnosis that defendant was not sane.

Dr. Simon testified there was nothing in the reports that indicated defendant had a psychological or psychotic problem before the murder. "I absolutely don't believe there's sufficient evidence to conclude that he meets the M'Naghten Rule and the criteria used in this state."

On direct examination, defense counsel asked Dr. Simon about the conclusions reached by Dr. Couture when he examined defendant. Dr. Simon testified that after he was arrested in this case, defendant told Dr. Couture that he had auditory hallucinations. Dr. Simon did not find defendant's statements credible because there was no subjective evidence to support defendant's claim of hallucinations.

Defense counsel showed Dr. Simon a report from Kern Medical Center, prepared in June 2011, before the murder in this case, when defendant claimed to have heard voices and suffered hallucinations.[18] Dr. Simon testified defendant's claims of hallucinations from the June 2011 hospitalization were credible "because of an acute drug overdose, not because of any severe mental disorder," and that "ultimately my opinion remains the same, that I don't think he was insane at the time of the crime" in August 2011.

Dr. Simon testified that a person who was actively psychotic would display disorganized speech. In June 2011, defendant was intoxicated on different drugs and he was admitted to the hospital; at that time, his speech was incomprehensible, he was disoriented, and he did not know why he was there. "Those are the signs of when somebody is truly psychotic." A person could develop a persistent psychotic disorder from chronic methamphetamine use, but that condition would not be the result of schizophrenia or a schizophrenic disorder.

---

[18] The defense introduced defendant's hospital reports into evidence at the first sanity trial.

Dr. Simon further testified that while Maria and Gloria "described that he was agitated and suspicious and carrying knives" before the murder, "there was no mention … that he was hearing voices or seeing things that were not there." If he had been suffering from "true psychosis, we would have thought that that would have come out at some point." During defendant's postarrest interview, "there was no mention whatsoever of any psychosis or voices or whatever. He only later claimed that to the people who evaluated him." "He doesn't report to the police that he's hearing voices. There's no mention of it in any of the interviews with any of those witnesses at the time of the crime. It sounds a little concocted, to tell you the truth." At the time of the murder, defendant "was intoxicated on methamphetamine and that by reason of that he was in a paranoid state," and could have believed the victim was trying to kill him.

Defense counsel asked Dr. Simon about Dr. Couture's determination that defendant was "impaired" and " '[t]here appears to be strong indication that there may be an insanity issue with [defendant's] functioning at the time of the crime.' " Dr. Simon testified that Dr. Couture had a professional responsibility to report the results of the tests that he administered, "[b]ut then the next question is: Do you believe it? Do you believe that the individual was really addressing himself to that task in all earnest, or were they trying to make themselves look bad?"

Dr. Simon acknowledged Dr. Couture believed there was a strong insanity issue in this case. However, Dr. Simon testified defendant demonstrated malingering during the psychological testing by the other experts, and he believed defendant was not insane at the time of the crime. He did not believe defendant's suicide attempt in jail, after he was arrested in this case, was necessarily consistent with being insane, and there was "insufficient evidence to conclude that the defendant has any kind of severe psychotic disorder or otherwise psychotic disorder."

Dr. Simon was not recalled to testify at the second sanity trial.

Dr. Longwith

Dr. Gary Longwith was also called by the defense at the first sanity trial and testified that he interviewed defendant in November 2012. Dr. Longwith testified the crime was "very unusual," since defendant did not know the victim. However, Dr. Longwith's opinion was that defendant was aware of what was going on, he was not insane at the time of the offense, and he did not have a defect that met the M'Naghten standard of insanity. "[A]t the time of the offense, based on my review of the record, based on my interview with him, his comments to me, his statements about what occurred, and after watching the video [of his post-arrest interview], I could not see any evidence that he was not of sound mind at the time" based on the M'Naghten standard, and he knew what he was doing was wrong.

Dr. Longwith found it significant that during defendant's postarrest interview with the detectives, he said he did not know the victim and he may have made a mistake. Defendant told Dr. Longwith that he believed the victim might have been a rival gang member, and he stabbed the victim in self-defense.

Dr. Longwith testified it was "probable" that defendant was malingering his psychotic symptoms; his definition of "probable" was between not a possibility and being definite. Defendant had an IQ of 73, which was in the "borderline" range. Defendant had a substantial history of drug and methamphetamine abuse, which could result in permanent brain damage, paranoia, and drug-induced psychosis. A person with the same drug history could have believed he was in danger and had to defend himself. Such conduct would be consistent with the reports from Maria and Gloria that defendant was acting "suspicious" and "weird" that day.[19]

[19] The defense introduced the recording of Maria's pretrial interview, as summarized in part 1, *ante*, as an exhibit at the first sanity trial.

Testimony at second sanity trial

Dr. Longwith was recalled by the defense at the second sanity trial. Dr. Longwith testified defendant may have been experiencing a delusional disorder at the time of the offense based on defendant's long term methadone treatment. Dr. Longwith clarified he originally diagnosed defendant with major depression with psychotic features, and polysubstance abuse with some antisocial personality disorder. After further review of his records, he believed defendant was also dependent on methadone.

Dr. Musacco

Dr. Michael Musacco testified at the first sanity trial that Dr. Couture's preliminary opinion was that defendant " 'may have been insane at the time of the crime,' " he appeared to have " 'a serious, persistent mental disorder that's not based on polysubstance dependence,' " and he " 'would probably meet the criteria for insanity at the time.' " However, Dr. Couture also wrote that further clarification and tests were needed, such as for malingering and neuropsychological examinations.

Dr. Musacco did not find support for Dr. Couture's finding that defendant suffered from a serious preexisting mental disorder that was not solely based on his drug problem. Dr. Musacco determined defendant had an IQ of 88, which was in the normal range. Dr. Musacco was concerned because there were major inconsistencies in defendant's statements to different experts about whether he heard voices. "I would have to have some evidence that gives me confidence that those symptoms existed outside or prior to the drug use, and I don't see it in this case."

Dr. Musacco believed defendant could have a drug-induced mental disorder based on his long history of using a variety of drugs. Defendant told the detectives he used methamphetamine the previous day, but he told Dr. Musacco he had used heroin, methamphetamine, and alcohol on the day of the murder. Dr. Musacco testified that defendant's confirmed methamphetamine use "played a role in this situation" and

impaired his mental state, so that he was paranoid and believed the victim had a gun in his bag.

Dr. Musacco testified his conclusion was supported by the incident a few weeks before the murder, when defendant was taken to the mental health ward of the hospital because he was not in touch with reality as a result of his drug use. The incident supported his conclusion that defendant's drug use impacted his functioning in a significant way. "I think the drugs really influenced his behavior and I think the drugs caused the symptoms that we've talked about."

Testimony at second sanity trial

Dr. Musacco was recalled by the defense at the second sanity trial. Dr. Musacco testified his primary diagnosis was that defendant was suffering from substance abuse disorders and polysubstance dependence. He believed defendant's substance abuse caused him to experience the symptoms of psychosis, such as hearing voices and having delusional beliefs. Dr. Musacco testified methamphetamine was "real bad for mimicking the symptoms of schizophrenia." He determined defendant suffered from this mental disorder prior to the murder.

Dr. Musacco did not know defendant had previously been placed on 72-hour involuntary psychiatric holds in the hospital for being a danger to himself or to others but believed his prior hospital commitments were drug related. There were no past reports of defendant hearing voices.

Dr. Musacco testified defendant's conduct of concealing his knife, asking the bus driver an innocuous question, and then stabbing the victim twice in the heart exhibited organized and goal directed behavior.

Dr. Velosa

Dr. Luis Velosa was called by the defense at the first sanity trial and had examined defendant twice. Dr. Velosa testified defendant was suffering from psychiatric symptoms "most likely caused by his heavy use of alcohol and drugs" at the time of the crime.

There was no evidence defendant had any type of psychiatric disorder, such as schizophrenia or bipolar disorder, that was separate from his drug abuse. Defendant's claims that he had auditory hallucinations and paranoid ideas resulted from his methamphetamine use, and not from a major psychiatric disorder. Defendant "was able to understand the difference between legal right and legal wrong" at the time of the offense.

Testimony at second sanity trial

Dr. Velosa was recalled by the defense at the second trial, and testified defendant suffered from severe mental issues attributable to his methamphetamine use at the time of the murder. He did not believe that defendant had a genetically inherited psychiatric illness. Defendant's psychiatric symptoms at the time of his offense had nothing to do with his withdrawal from methadone because he had been receiving a minimal dose. In addition, someone experiencing methadone withdrawal symptoms would be medically sick and would not be able to stand in line for a bus.

Defendant's testimony

Defendant did not testify at the guilt phase or the first sanity trial.

At the second sanity trial, defendant testified on the limited topic that he entered and participated in a methadone program because his parole officer ordered him to do so after he gave a "dirty" test. The court did not allow the parties to ask him additional questions.

Defendant's prior custodial periods

The People did not introduce any evidence at the first sanity trial.

At the second sanity trial, the prosecutor called Lieutenant Michael Dobbs, who was the custodian of records at the Lerdo Jail. Dobbs testified that based on his review of defendant's records, he had been booked into custody on twenty separate occasions, beginning on October 4, 1998, and most recently on August 9, 2011, when he was arrested in this case.

Dobbs testified that in the prior 19 bookings before his most recent custodial period, there had been no reports that defendant engaged in any bizarre or hallucinatory behavior while he was in jail, and there had been no mental health referrals prior to being taken into custody for the homicide in this case.[20]

The court's finding that defendant was sane

Judge Brehmer presided over the second sanity trial, and stated he read the entire transcript of the prior proceedings, reviewed every piece of evidence admitted, and watched all videos.

On April 20, 2017, the court made lengthy findings and held defendant was sane at the time of the murder. The court stated the law was "quite clear" based on CALCRIM No. 3450, and sections 25 and 29.8. The court continued:

> "The defendant is presumed to be sane at the time and it is the Defense burden with the preponderance of the evidence to prove otherwise. Oftentimes, preponderance is referred to globally as – well, it preponderates one way or *slightly more or 51 percent, all though that's not legally accurate,* but that type of reference, it's not beyond a reasonable doubt, it's much lower burden of proof. It's the burden of proof in most civil cases." (Italics added.)[21]

Turning to the evidence, the court stated that it did not think "that one would have to find that Lupita Navarro lied in order to discount what she – her testimony was about the defendant talking to himself or seeing things that she did not see when he was a very young man or during the time period that she testified after he was about 20-years or older when he was in his 20s that he was using illegal drugs. Use of illegal drugs would

---

[20] In issue I, *post,* we will address defendant's contention that defense counsel was prejudicially ineffective for failing to object to this evidence.

[21] In issue III, *post,* we will address defendant's contention that the court's italicized statements showed that it relied upon an incorrect burden of proof to find defendant was sane at the time of the murder.

be consistent with hallucinations, seeing things that aren't there and talking things that aren't there, but are there in the individual's mind that are using those drugs."

The court found Mrs. Navarro credible, it took her testimony at "face value," and did not think she was lying. The court also found defendant's testimony credible, that he believed his parole officer ordered him to enter a methadone program.

The court then turned to defendant's postarrest interview.

> "Certainly [defendant's] statement and videotaped statement was not true. It didn't start out truthful and it ended up sort of truthful based on the other evidence towards the end after a very great period of time. [¶] It's my duty to follow the law and as I follow the law the defense has not proven that [defendant] was legally insane when he committed the murder. I find that he was legally sane. I do not find that the defendant has met the burden."

The court noted that there was evidence of defendant's extensive drug use and possible methadone withdrawal. However, Dr. Velosa testified that a person would not continue to suffer from methadone withdrawal symptoms two months after stopping treatment. Dr. Velosa also testified that defendant's psychiatric symptoms "were secondary to methamphetamine," including hearing voices.

The court concluded:

> "It's possible that the defendant did have methadone withdrawal symptoms. Let's say he did. He ingested a drug or intoxicant if that caused organic brain damage of which we did not have any testimony. We had questions, but no definitive answers or settled mental disease or defect that lasted after the immediate effects of the intoxicants had worn off. That's not a defense.
>
> "If, based on the evidence, it was submitted that the defendant was high on methamphetamine at the time of the murder, a temporary medical condition caused by the recent use of drugs or intoxicants is not legal insanity. I do not find that there was a defect combined with another mental disease or defect that could qualify as legal insanity based on the evidence."

SANITY PHASE AND SENTENCING ISSUES

DISCUSSION

I. Admission of the Prosecution's Evidence at the Second Sanity Trial

Defendant contends his attorney was prejudicially ineffective for failing to object to the evidence introduced by the People at the second sanity trial, that he did not have any mental health referrals when he was previously held in custody before his arrest in this case.

A. The Prosecutor's Motion in Limine

Prior to the guilt phase, the prosecutor filed a motion in limine that was directed to a possible sanity trial if defendant was convicted of the substantive charge.

The prosecutor argued that if the case proceeded to a sanity trial, the People could introduce evidence that when defendant was previously held in custody in Kern County, there had been no prior incident reports or psychiatric referrals. The prosecutor's motion stated that "[t]he People's expert will be heavily relying on this as well. [¶] This evidence is profoundly relevant, and strongly indicative of the Defendant's claims of insanity … are simply an effort to escape the consequences of his actions in a case where the evidence of his guilt is quite strong." The prosecutor acknowledged that such evidence was potentially prejudicial since it would show defendant had been incarcerated several times but argued there was strong probative value about "the complete lack of even a single report of any bizarre behavior from any of his prior bookings."

B. The Court's Hearing

Also prior to the guilt phase, the court addressed the prosecutor's motion about possible evidence at a subsequent sanity trial.

The prosecutor clarified that defendant had been held at the Lerdo Jail 20 times in the previous 17 years, and there had not been any psychiatric referrals made. There had been "a couple" after he was arrested in this case, "but none of that started until his current offense when he started claiming not guilty by reason of insanity."

The prosecutor argued the evidence was admissible "to enable the doctors to have as full and comprehensive a history of the defendant with professionals, who if they see him acting in a manner that is in any way … indicative of somebody who has any mental problems…." The prosecutor argued that the question at the sanity phase would be whether defendant was a person with a "history of this? And if he doesn't have a history, well, gee, is he just flying under the radar and none of his relatives reported him? Maybe he's poor. He might not be like a professional person who would go to a psychiatrist …." The prosecutor argued:

> "In this instance the defendant has had frequent contacts with people who have a statutory duty and, frankly, a financial interest because they don't want to get sued by somebody if they have somebody with mental health issues and they're not providing appropriate care."

The prosecutor argued such evidence was extremely probative at the sanity phase and would not be prejudicial since he would have already been convicted.

Defense counsel objected and argued the prosecutor was "using negatives improperly, to which there is no comeback." Counsel argued defendant had committed "a bizarre and horrible act" unrelated to any of his prior history, and the People could not use his "lack of activity" against him to prove he was sane because "[t]hing get worse. Things build up. Drug use creates more and more havoc. It combines with alcohol. It combines with other things, other stressors, all of which, by the way, Dr. Velosa and Dr. Couture and Dr. Simon found" had "clearly caused problems," and Dr. Couture concluded it "rose to a mental health disorder."

The court asked whether the experts who were going to testify had reviewed defendant's records from the jail. Defense counsel said yes. The court stated that if someone was putting their sanity at issue, then any mental health examination of that person would be relevant to expert opinion. The court believed it was "fair game for either attorney to look at prior incarcerations that may have dealt with a mental health issue or absence of a mental health issue."

The prosecutor stated that if defendant had a long history of mental health treatment, "and in his prior bookings the mental health people" at the jail observed behavior consistent with mental health problems, then defense counsel would try to introduce that evidence as "very probative of his mental health."

> "By the same token, the absence of any of that stuff, complete absence of any of that stuff, is also very probative of his mental health for the exact same reason. It goes to show that this defendant is malingering by constructing an insanity defense once he is now faced with a very, very serious offense…."

The prosecutor said he would have a records custodian testify that there were no prior reports of odd or psychiatric behavior requiring any referrals in his prior custodial periods until his current incarceration.

Defense counsel argued the absence of any reports was not admissible for the fact of the matter but was possibly admissible if relied upon by the experts to reach their opinions. The prosecutor agreed.

C. The Court's Ruling

The court granted the prosecutor's motion to introduce this evidence and stated that the prosecutor needed a custodian or doctor to testify that there was an absence of any psychiatric reports or referrals in defendant's prior booking records, and that there would have been reports if defendant had shown such behavior. The court further stated that the expert could be asked if the absence of any reported bizarre behavior was relevant to determine sanity. The court stated the evidence would be admissible only to support an expert opinion and not for the truth of the matter, and the jury in the sanity trial would receive an appropriate limiting instruction.

D. The First and Second Sanity Trials

The prosecutor did not call any witnesses or introduce this evidence at the first sanity trial. However, the prosecutor extensively cross-examined the experts who were

called by the defense, all of whom testified that defendant was not insane at the time of the murder.

During the second sanity trial, that was held before the court, the defense recalled three experts who had examined defendant and already testified at the first sanity trial. The prosecutor again extensively cross-examined the experts about their conclusions that defendant was not insane at the time of the murder.

The prosecutor called one witness at the second sanity trial, the records custodian from the Lerdo Jail, who testified as set forth above that in defendant's prior 19 bookings before his most recent custodial period, there had been no reports that defendant engaged in any bizarre or hallucinatory behavior while he was in jail, and there had been no mental health referrals prior to being taken into custody for the murder.

Defense counsel did not object to this evidence.

E. Defendant's Contentions

Defendant argues defense counsel was prejudicially ineffective for failing to object to the prosecutor's introduction of the evidence at the second sanity trial that there were no prior mental health referrals during his previous custodial periods in jail. Defendant asserts the court's prior ruling allowed the introduction of this evidence only to support the opinion of an expert witness, and the prosecutor never called any experts to testify at the sanity trials. Defendant argues there was "no admissible purpose" for this evidence in the absence of a prosecution expert.

Defendant further argues counsel's failure to object was prejudicial based on the supposition that the court would have granted a motion to strike if he had objected to this evidence, and the prosecutor improperly asserted in closing argument that defendant was not insane since there were no prior referrals during his previous custodial periods and his history showed he was not "even close to being legally insane."

F. Analysis

"A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 309.) "Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence. [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 621.)

The basis for defendant's ineffective assistance claim is that while the court initially held that evidence about his prior custodial periods was admissible, the court's ruling was contingent on the evidence being introduced to support a prosecution expert's expected testimony about the relevance that defendant did not have any prior mental health referrals during his previous custodial periods. Defendant argues that since the prosecution did not call experts at either sanity trial, the evidence about his prior custodial periods was thus inadmissible.

While the People did not call an expert at the sanity trials, that procedural matter is not determinative given the circumstances of this case. There were five experts involved in this case. Dr. Couture examined defendant was but was unable to appear. There were three experts who examined defendant and were called by the defense.

Dr. Simon was the fifth expert. He was retained by the prosecution, did not examine defendant, and reviewed the reports from the other experts. Dr. Simon testified at the guilt phase for the People. He was called by the defense at the first sanity trial, and extensively cross-examined by the prosecutor.

Dr. Simon testified at the first sanity trial that he reviewed the sheriff's report, incident reports from the jail following defendant's arrest, and defendant's prior jail bookings.

"[DEFENSE COUNSEL]. When you issued your report…, what else did you consider …?

"[DR. SIMON]. *Well, I was able to review the sheriff's report as well as incident reports from the county jail*. And in addition to that, the district attorney emailed me a list of prior jail bookings on behalf of the defendant.

"Q. Okay. Were you able to discover or see … in the stuff you read there, whether it's both the psychological reports, police reports, or the additional material counsel supplied to you, was there anything there that indicated a psychological or psychotic problem before the date of the crime?

"A. No." (Italics added.)

Dr. Simon testified while there were references in the reports prepared by other experts about auditory hallucinations, "I absolutely don't believe there's sufficient evidence to conclude that he meets the M'Naghten Rule and the criteria used in this state." If defendant had been suffering from "true psychosis, we would have thought that *that would have come out at some point*." (Italics added.)

While Dr. Simon was not recalled at the second sanity trial, the court advised the parties that it would decide the question of defendant's sanity by reviewing the entirety of the records from the prior proceedings in the case, including the first sanity trial. Dr. Simon had already testified at the first sanity trial that he reviewed reports from the jail and did not see any evidence that defendant showed prior psychotic behavior before his arrested in this case.

"Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581; *People v. Zapien* (1993) 4 Cal.4th 929, 980.) The prosecutor did not violate the court's order when he called the jail's records custodian at the second sanity trial and introduced the evidence about the absence of mental health referrals, since Dr. Simon's testimony had already been admitted and provided the foundation for the additional evidence.

These circumstances would explain why defense counsel, who had vigorously objected to the prosecutor's proposed evidence about the prior bookings, did not object.

II. The Presumption of Sanity

Defendant argues that at the second sanity trial, the court improperly presumed he was sane and shifted the burden to the defense to prove his insanity. Defendant argues the court's improper presumption and burden-shifting violated his constitutional right to due process and requires reversal of the sanity verdict.

"The 'sanity trial is but a part of the same criminal proceeding as the guilt phase' [citation] but differs procedurally from the guilt phase of trial 'in that the issue is confined to sanity *and the burden is upon the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense*' [citation]. As in the determination of guilt, the verdict of the jury must be unanimous. [Citation.]" (*Hernandez, supra*, 22 Cal.4th at p. 521, italics added.)

Defendant acknowledges the well-settled rule that he was presumed sane after the guilt phase, and he had the burden to prove his insanity by a preponderance of the evidence. However, defendant argues *Leland v. Oregon* (1952) 343 U.S. 790 and other cases that have previously been relied on to presume sanity and shift the burden to defendant have been impliedly overruled by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*).

In People v. Ferris (2005) 130 Cal.App.4th 773 (*Ferris*), this court rejected the identical claim. *Ferris* held *Leland* was still controlling after *Apprendi* and *Ring*, the defendant was properly presumed sane at the sanity phrase, and the defense still had the burden to prove the defendant was insane. (*Ferris*, at p. 780.)

> "Defendant here attempts to characterize sanity as an element of the offense charged, when in fact the question is one of insanity as a defense. Insanity has not been characterized by the United States Supreme Court or California courts as an element of the offense; it is found to be in the nature of a defense that relieves defendant of culpability for his or her convictions.

> 'An insanity plea … is a plea to the effect that the defendant, even if guilty, should not be punished for an offense because he was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the offense.' [Citation.]
>
> "*Apprendi* instructs that a state cannot disguise 'elements' by calling them enhancements or sentencing factors, when in fact they are used to impose a higher sentence than was authorized by the jury's verdict alone. The sanity portion of a trial does not involve questions of guilt versus innocence, but involves questions of criminal responsibility versus legal insanity. A finding of sanity does not increase the maximum penalty one can receive if punished according to the facts as reflected in the jury verdict alone. Neither *Apprendi* nor *Ring* in any way impliedly overrules the decisions holding that insanity is not an element of a criminal offense." (*Ibid*.)

Defendant concedes that *Ferris* rejected his arguments that *Apprendi* and *Ring* overruled prior cases about the presumption of sanity and the burden of proof but argues that *Ferris* was wrongly decided. However, we reaffirm our decision in *Ferris*, reject defendant's arguments, and find the court at the second sanity trial properly stated that defendant was presumed sane and had the burden to prove his insanity by a preponderance of the evidence.

III. The Court's Statements About the Burden of Proof

Defendant next contends the court applied an erroneous burden of proof to the determination of whether he was insane at the time of the murder. His arguments are based on the court's statements at the conclusion of evidence introduced at the second sanity trial, just before the court made any findings. The court stated the law was "quite clear" for the sanity phase, and cited CALCRIM No. 3450, and sections 25 and 29.8. The court then stated:

> "The defendant is presumed to be sane at the time and it is the Defense burden with the preponderance of the evidence to prove otherwise. Oftentimes, preponderance is referred to globally as – well, *it preponderates one way or slightly more or 51 percent, all though that's not legally accurate*, but that type of reference, it's not beyond a reasonable

doubt, it's much lower burden of proof. It's the burden of proof in most civil cases." (Italics added.)

Defendant contends the court's italicized statements "reflect a fundamental misunderstanding of the preponderance standard. Contrary to the court's interpretation, evidence which 'preponderates one way or slightly more or 51 percent' is the exact definition of a preponderance of the evidence. Because the trial judge rejected this correct standard and went on to find [defendant] sane under some other (and therefore necessarily incorrect) standard, the sanity verdict must be reversed."

A. Preponderance of the Evidence

As explained above, a defendant who proceeds at trial on a plea of not guilty by reason of insanity has the burden of proving by a preponderance of the evidence that he was legally insane at the time of the underlying offense. (§ 25, subd. (b); *Hernandez, supra,* 22 Cal.4th at p. 521.)

"Preponderance of the evidence means ' "that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, *not necessarily in number of witnesses or quantity,* but in its effect on those to whom it is addressed." (Italics added.)' [Citation.] In other words, the term refers to 'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

" 'A preponderance of the evidence standard … simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [the fact finder] may find in favor of the party who has the burden to persuade the [it] of the fact's existence." ' " (*In re Angelia P*. (1981) 28 Cal.3d 908, 918, quoting *In re Winship* (1970) 397 U.S. 358, 371–372 (Harlan, J., concurring); *In re Michael G*. (1998) 63 Cal.App.4th 700, 709, fn. 6; *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.) When the burden of proof is a preponderance of the evidence, the parties " 'share the risk of error in roughly equal fashion.' [Citations.]" (*People v. Mary H*. (2016) 5

Cal.App.5th 246, 256.) "The preponderance standard remains 'more likely than not.' [Citation.]" (*People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1305, fn. 28.)

B. Analysis

The court did not apply the wrong burden of proof when it said the "51 percent" standard was not "legally accurate." The court prefaced this comment by citing to other legal standards – that the law at the sanity trial was "quite clear" based on CALCRIM No. 3450, and sections 25 and 29.8.

Section 25, subdivision (b) states:

> "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves *by a preponderance of the evidence* that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (Italics added.)

Section 29.8 states:

> "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances. This section shall apply only to persons who utilize this defense on or after the operative date of the section."

CALCRIM No. 3450, on the burden and elements of an insanity finding, states in relative part:

> "The defendant must prove that *it is more likely than not* that (he/she) was legally insane when (he/she) committed the crime[s]. [¶] The defendant was legally insane if: [¶] 1. When (he/she) committed the crime[s], (he/she) had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature and quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong." (Italics added.)

CALCRIM No. 3450 has been found to be a correct statement of the law for a sanity trial. (*People v. Thomas* (2007) 156 Cal.App.4th 304, 310–311; *People v. McCarrick* (2016) 6 Cal.App.5th 227, 250–252.)

As noted by defendant, there are cases that have not disapproved colloquial descriptions by either a court or an attorney that "at least 50 percent" or "51 percent" of the evidence satisfies the preponderance of the evidence standard. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 735; *Brenner v. Department of Motor Vehicles* (2010) 189 Cal.App.4th 365, 372 (disapproved on other grounds in *Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1216–1217); *People v. Wilson* (2006) 38 Cal.4th 1237, 1246; *Union Pacific Railroad Co. v. State Bd. of Equalization* (1991) 231 Cal.App.3d 983, 1000.) The court in this case, however, cited to the correct legal standard as set forth in cases and jury instruction, and did not rely on an incorrect legal standard to find defendant failed to meet his burden to prove he was insane at the time of the murder.

PART III

SENTENCING

On May 18, 2017, the court sentenced defendant to 25 years to life for murder, plus one year for the deadly weapon enhancement.

In a supplemental brief, defendant raises one sentencing issue. He argues the matter must be remanded for a new sentencing hearing because of the enactment of section 1001.36 in 2018, which allows a qualifying defendant to participate in pretrial diversion and receive mental health treatment.

Defendant asserts he is entitled to receive the benefit of the new statute, even though he committed the homicide in 2011, he was convicted of first degree murder in 2016, and the court found he was sane and sentenced him in 2017. Defendant asserts section 1001.36 is an ameliorative law that should be given retroactive effect. Defendant further states that he is entitled to the benefits of the 2018 version of section 1001.36, and

not the amendments in 2019 that specifically excluded someone charged with murder from being considered for diversion.

I. Section 1001.36

"Section 1001.36 created a diversion program for defendants who suffer from medically recognized mental disorders, 'including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder ....' (§ 1001.36, subd. (b)(1)(A).) [T]he law took effect on June 27, 2018. [Citations.]" (*People v. Craine* (2019) 35 Cal.App.5th 744, 750, review granted, Sept. 11, 2019, S256671 (*Craine*).)[22]

Effective January 1, 2019, section 1001.36 was amended to prohibit diversion "in cases involving murder, voluntary manslaughter, rape and other sex crimes, the use of a weapon of mass destruction, and any offense 'for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314 [, i.e., indecent exposure].' [Citations.]" (*Craine, supra,* 35 Cal.App.5th at p. 750.)

"Subject to numerous caveats and restrictions, trial courts may now 'grant pretrial diversion' when a mentally disordered individual is charged with a misdemeanor or felony offense (other than those previously mentioned). [Citation.] The defendant must first produce evidence of a mental disorder, which requires 'a recent diagnosis by a qualified mental health expert.' [Citation.] Among other requirements, the trial court must be 'satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense,' and a mental health expert must also conclude 'the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment.' [Citations.]" (*Craine, supra,* 35 Cal.App.5th at p. 751.)

---

[22] While the California Supreme Court has granted review in *Craine*, we may rely on the case as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

"As used in section 1001.36, pretrial diversion means 'the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to [additional restrictions.]' [Citation.] [¶] If a defendant meets the eligibility requirements of section 1001.36, the trial court may order pretrial diversion into an approved treatment program for a maximum period of two years. [Citations.] If the defendant commits additional crimes or otherwise performs unsatisfactorily in the diversion program, criminal proceedings may be reinstated. [Citation.] 'If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.' [Citation.] The statute further provides for expungement of the 'record of the arrest,' with specified limitations. [Citations.]" (*Craine, supra,* 35 Cal.App.5th at pp. 751–752.)

A. Retroactivity of Section 1001.36

" 'The Legislature ordinarily makes laws that will apply to events that will occur in the future. Accordingly, there is a presumption that laws apply prospectively rather than retroactively. But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature .... [Citation.]' [Citation.]" (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307.) " '[I]n the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible ....' [Citations.]" (*Id*. at p. 308, fn. omitted.)

There is a split of authority among appellate courts as to whether section 1001.36 is retroactive. In *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted, December 27, 2018, S252220, the court relied on *In re Estrada* (1965) 63 Cal.2d 740,

and held the "Legislature 'must have intended' that the potential 'ameliorating benefits' " of the new statute would apply to cases not yet final on appeal. (*Frahs*, at p. 791.) *Frahs* conditionally reversed the judgment and remanded the matter for the trial court to conduct a mental health diversion eligibility hearing under section 1001.36 because the record showed the defendant met at least one of the statute's threshold requirements. (*Frahs*, at pp. 791–792.)

The California Supreme Court has granted review in *Frahs* and cases that similarly held section 1001.36 is retroactive, even when a defendant has already been convicted of an offense, as long as the case is not yet final. (See, e.g., *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted, Nov. 26, 2019, S258541; *People v. Burns* (2019) 38 Cal.App.5th 776, 785–789, review granted, Oct. 30, 2019, S257738 (conc. & dis. opn. of Huffman, J., concluding the statute is not retroactive); *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted, Oct. 9, 2019, S257049 *People v. Aguayo* (2019) 31 Cal.App.5th 758, review granted, May 1, 2019, S254554.)

B. Craine

In *Craine*, *supra*, 35 Cal.App.5th 744, this court disagreed with *Frahs* and held the new diversion law was not retroactive. *Craine* recognized that section 1001.36 "confers a potentially ameliorative benefit to a specified class of persons. The question, however, is whether the class includes defendants who have already been found guilty of the crimes for which they were charged." (*Craine*, *supra*, 35 Cal.App.5th at p. 754.) *Craine* focused on "how the Legislature chose to define the benefit itself, i.e., pretrial diversion." (*Ibid.*)

> "As discussed ' "pretrial diversion" means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication ....' [Citation.] We agree … that 'adjudication,' which is an undefined term, is shorthand for the adjudication of guilt or acquittal. [Citations.] At most, 'adjudication' could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of

sentencing. [Citations.] Beyond that point, the trial court ordinarily ceases to have jurisdiction over the matter. [Citations.]

"The *Frahs* opinion concedes the limits of the term 'adjudication,' recognizing the appellant had 'technically been "adjudicated" in the trial court.' [Citation.] However, *Frahs* concludes this language is not probative of the Legislature's intent because '[t]he fact that mental health diversion is available only up until the time that a defendant's case is "adjudicated" is simply how this particular diversion program is ordinarily designed to operate.' [Citation.] We do not agree with this reasoning. First, '[t]he purpose of those programs is precisely to *avoid* the necessity of a trial.' [Citation.] Second, the canons of statutory interpretation require scrutiny of the relevant text, 'giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.' [Citation.]

"The other key definitional phrase is 'the postponement of prosecution.' [Citation.] [P]rosecution is synonymous with 'criminal action,' and it means ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment." ' [Citations.] A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until ... the accused is "brought to trial and punishment" or is acquitted.' [Citation.] Accordingly, … trial is 'the penultimate step in a criminal action,' and the final step is 'punishment.' [Citation.] Based on these principles, we conclude the prosecution phase ends with the rendition of judgment and sentencing.

"Pursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone...." (*Id.* at pp. 755–756.)

"Pursuant to the foregoing analysis, we hold section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing...." (*Craine*, *supra*, 35 Cal.App.5th at p. 760.)

We reaffirm *Craine* and again conclude that section 1001.36 is not retroactive to defendant's case since he was tried, convicted, and sentenced prior to the effective date of the statute.

C. The 2019 Amendment

While we have found that section 1001.36 is not retroactive, we will address defendant's related issue about which version of the law should be retroactive.

As noted above, section 1001.36 was amended in 2019 to provide that persons charged with murder and other specific felonies are not eligible for diversion. (*People v. McShane* (2019) 36 Cal.App.5th 245, 259, review granted Sept. 18, 2019, S161037 (*McShane*).)[23] Defendant asserts that if section 1001.36 is retroactive, only the 2018 version of the law that was initially enacted should apply to his case since it provides him with the ameliorative benefit of diversion, and not the 2019 amended version that expressly excludes a person charged with murder from diversion.

In *McShane*, *supra*, 36 Cal.App.5th 245, the court addressed the identical contention in a case where the defendant had already been convicted of murder. The defendant argued section 1001.36 was retroactive to his case since it was not yet final, but also that he was entitled to the retroactive effect and ameliorative benefit of the 2018 diversion law, and not the 2019 amendment that excluded murder from the scope of diversion:

> "In a feat of argumentative gymnastics, defendant argues that: [¶] (1) He is entitled to the benefit of the new diversion provisions, because they are ameliorative; however, [¶] (2) He is not subject to the even newer murder exclusion, because (a) it is not ameliorative, and (b) as applied to him, it would have a prohibited ex post facto effect. [¶] In other words, defendant argues that statutory amendments while a conviction is on appeal are a one-way ratchet – they can reduce punishment, but they cannot restore it. We disagree." (*McShane*, *supra*, 36 Cal.App.5th at pp. 259–260.)

McShane explained a similar issue was addressed in *People v. McKinney* (1979) 95 Cal.App.3d 712, where the defendant committed kidnapping to commit robbery with

---

[23] The California Supreme Court has also granted review in *McShane*, but again we may rely on the case as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

bodily harm, first degree murder, and other crimes, in 1975. (*McShane*, *supra*, 36 Cal.App.5th at pp. 260–261.)

> "At that time [in *McKinney*], the statutory penalty for kidnapping to commit robbery with bodily harm was either death or life imprisonment without the possibility of parole. [Citation.] He was tried in 1976 [citation] and sentenced to life without the possibility of parole. [Citation.] [¶] Effective July 1, 1977, the statute was amended so as to reduce the penalty to life imprisonment with the possibility of parole. [Citation.] In 1978, however, an initiative fixed the penalty for kidnapping to commit robbery, when committed in the course of first degree murder, as life without the possibility of parole. [Citation.] [¶] The defendant argued that, under the amendment, he was entitled to have his sentence reduced to life with the possibility of parole. [Citation.] The appellate court did acknowledge that, '[a]bsent compelling proof of a specific legislative intent that a statute reducing the punishment for an offense is only to apply prospectively, such a statute applies retroactively to all convictions lacking finality at the time of the effective date of the ameliorating law. [Citations.]' [Citation.] It held, however, that 'the 1978 statute, operative long prior to the finality of this judgment, restored McKinney's original punishment.' [Citation]" (*Id.* at pp. 260–261.)

McShane acknowledged *Frahs* and held that assuming, without deciding, that section 1001.36 was retroactive to all cases not yet final, the defendant was still ineligible for diversion since he was convicted of murder, and he was not entitled to a remand for consideration of pretrial diversion limited to the 2018 version. (*McShane*, *supra*, 36 Cal.App.5th at pp. 260–261.)

> "[W]hen defendant committed the crime, he was not eligible for pretrial diversion, because … section 1001.36 did not yet exist. Now, he is not eligible for pretrial diversion, because of the murder exclusion. Thus, the enactment of the murder exclusion did not change the consequences of his crime *as of the time he committed it*. The fact (if it is a fact) that he was briefly eligible for pretrial diversion under … section 1001.36, as originally enacted, is irrelevant to the retroactivity analysis." (*Id.* at p. 260; see also *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, review granted, Aug. 14, 2019, S256113.)

We agree with *McShane* and similarly find that even if section 1001.36 was retroactive to cases not yet final on appeal, defendant would not be eligible for diversion pursuant to the 2019 amendment that excluded murder.

D. The Sentencing Hearing

Finally, even if the 2019 version of section 1001.36 was retroactive to defendant's case, we find that remand would be an idle act based on *People v. Jefferson* (2019) 38 Cal.App.5th 399. *Jefferson* stated that assuming, without deciding, the statute was retroactive, "the record before us 'clearly indicates' the trial court would not have found defendant eligible for diversion." (*Id*. at p. 407.)

"To be eligible for consideration for pretrial diversion, the trial court must be 'satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense,' meaning that it 'substantially contributed' to defendant's commission of the offense. [Citation.] Here, the trial court had before it evidence of defendant's mental health history including defendant's medical records, his testimony regarding his mental health history, the prosecution's expert testimony regarding defendant's mental state, video evidence of the attempted store robbery, and the police interview with defendant shortly after the crimes took place. After considering such evidence, the court expressly stated on the record: '*[W]hatever mental or physical condition the defendant may have been suffering from had no bearing whatsoever on his conduct*, and therefore, had no ability to reduce his culpability for the crimes he was convicted of in this case.' (Italics added.) Referring to defendant's video interview introduced at trial, the court concluded defendant 'clearly knew exactly what he was doing, he clearly stated during the videotaped event itself that it was clear he was making demands of the clerk, he was trying to prevent [Mr.] Rodriguez from getting involved because he knew exactly what he was doing. He knew it was wrong. He was not operating under anything that would suggest that he did not know what he was doing or that he was under any distress of any type other than he was trying to get some money.'

[¶] On this record, the trial court clearly indicated defendant's alleged mental health disorder was not a significant factor in his commission of the charged offenses, making him ineligible for diversion. Thus, remanding the matter to the trial court would be an idle act. [Citations.]" (*Jefferson, supra,* 38 Cal.App.5th at p. 408.)

At the sentencing hearing in this case, the court found multiple aggravating circumstances and no mitigating circumstances. The court reviewed the record about the defendant's drug use and focused on the pathologist's testimony that the path of the first stab wound was "[t]en inches into the chest of the [victim]. The second entry was ten and a half inches," and the wounds "penetrated the lung, heart, pulmonary artery, and aortae. Cause of death was multiple stab wounds, both penetrating the heart." "The Court finds that this is a very cold, cruel, callous, cowardly, and … senseless attack to a gentleman who was seated in a bus, not posing any danger, apparently, to anyone."

The court's statements are consistent with the conclusion in *Jefferson,* that remand would be an idle act even if the 2018 version of the diversion statute was retroactive to defendant's case.

DISPOSITION

The judgment is affirmed.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
MEEHAN, J.